TEXAS REGISTER

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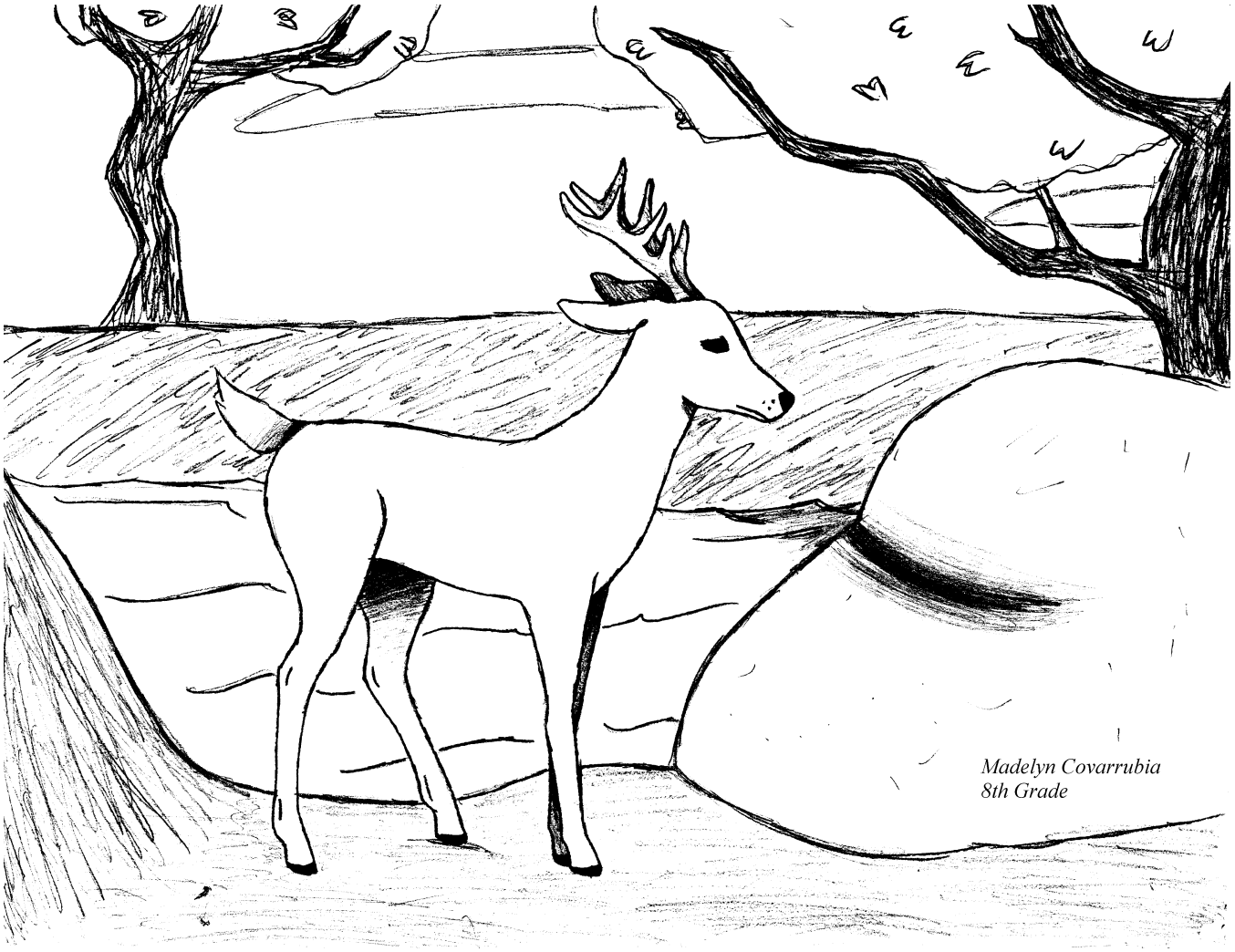

Madelyn Covarrubia
8th Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

WITHDRAWN RULES

ADOPTED RULES

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

Appointments

Appointments for December 8, 2006

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Phil Adams of Bryan.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Ramona Bass of Fort Worth.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Van Cliburn of Fort Worth.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Paul Foster of El Paso.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Jodie Lee Jiles of Houston.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Margaret Martin of Laredo.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Reverend William Dwight McKissic of Arlington.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Nancy R. Neal of Lubbock.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, The Honorable J. Rolando Olvera of Brownsville.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Lynden B. Rose of Houston.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Ida Louise "Weisie" Clement Steen of San Antonio.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Calvin W. Stephens of Dallas.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, David Dean Teuscher of Beaumont.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Morton Topfer of Austin.

Appointed to the 2007 Inaugural Committee for a term at the pleasure of the Governor, Robert Vernon Wingo of El Paso.

Appointed to the Texas Board of Orthotics and Prosthetics for a term to expire February 1, 2011, James C. Wendlandt of Austin (replacing Wanda Ferguson of Brownwood whose term expired).

Appointed to the Judicial Districts Board for a term to expire December 31, 2006, Craig Enoch, Supreme Court Justice (ret) of Austin. Justice Enoch is replacing Joe Wolfe who is deceased.

Appointed to the Midwestern State University Board of Regents for a term to expire February 25, 2012, Carol Carlson Gunn of Graford (replacing David Stephens of Plano whose term expired).

Appointed to the Midwestern State University Board of Regents for a term to expire February 25, 2012, Charlye Ola Farris of Wichita Falls (replacing John Bridgman of Wichita Falls whose term expired).

Rick Perry, Governor

TRD-200606633

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THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0553-GA

Requestor:

Mr. Dewey E. Helmcamp III, J.D.

Executive Director

Texas Board of Veterinary Medical Examiners

333 Guadalupe, Suite 3-810

Austin, Texas 78701-3942

Re: Validity of a rule adopted by the Board of Veterinary Medical Examiners that prohibits a licensee from dispensing any controlled substance unless the licensee is registered with the Department of Public Safety (Request No. 0553-GA)

Briefs requested by January 10, 2007

RQ-0554-GA

Requestor:

The Honorable John W. Segrest

McLennan County Criminal District Attorney

219 North Sixth Street, Suite 200

Waco, Texas 76701

Re: Status of an individual appointed as constable of a precinct that was subsequently eliminated as a result of redistricting (Request No. 0554-GA)

Briefs requested by January 10, 2007

RQ-0555-GA

Requestor:

Honorable C. E. "Mike" Thomas, III

Howard County Attorney

Post Office Box 2096

Big Spring, Texas 79721-2096

Re: Authority of a local taxing unit to waive penalties and interest on taxes that became delinquent as a result of an act or omission of an agent of the appraisal district (Request No. 0555-GA)

Briefs requested by January 10, 2007

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200606626
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: December 12, 2006

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

SUBCHAPTER B. GENERAL REPORTING RULES

1 TAC §20.62

The Texas Ethics Commission proposes new §20.62, regarding the reporting of a political expenditure made out of personal funds by a staff member of either a candidate, officeholder, or political committee.

The proposed rule provides a simplified method for reporting political expenditures made out of personal funds by a staff member of a candidate, an officeholder, or a political committee that are reimbursed during the same reporting period and that in the aggregate do not exceed $500. Expenditures made by a staff member that do not meet these criteria are reported as a loan. Ethics Advisory Opinion No. 450 (2003) would be superceded in part by the rule.

David A. Reisman, Executive Director, has determined that for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The proposed new §20.62 is proposed under Government Code, Chapter 571, Section 571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The proposed new §20.62 affects section 254.031 of the Election Code.

§20.62. Reporting Staff Reimbursement.

(a) Political expenditures made out of personal funds by a staff member of an officeholder, a candidate, or a political committee with the intent to seek reimbursement from the officeholder, candidate, or political committee that do not exceed $500 during the reporting period may be reported as follows IF the reimbursement occurs during the same reporting period that the initial expenditure was made:

(1) the amount of political expenditures that in the aggregate exceed $50 and that are made during the reporting period, the full name and address of the persons to whom the expenditures are made and the dates and purposes of the expenditures; and

(2) included with the total amount or a specific listing of the political expenditures of $50 or less made during the reporting period.

(b) Except as provided by subsection (a) of this section, a political expenditure made out of personal funds by a staff member of an officeholder, a candidate, or a political committee with the intent to seek reimbursement from the officeholder, candidate, or political committee must be reported as follows:

(1) the amount of the expenditure made by the staff member is reported as a loan to the officeholder, candidate, or political committee;

(2) the expenditure made by the staff member is reported as a political expenditure by the officeholder, candidate, or political committee; and

(3) the reimbursement to the staff member to repay the loan is reported as a political expenditure by the officeholder, candidate, or political committee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 5, 2006.

TRD-200606492

Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 463-5800

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CHAPTER 24. RESTRICTIONS ON CONTRIBUTIONS AND EXPENDITURES APPLICABLE TO CORPORATIONS AND LABOR ORGANIZATIONS

1 TAC §24.1

The Texas Ethics Commission proposes an amendment to §24.1, relating to the types of corporations to which certain restrictions apply.

The proposed amendment would update the current rule to add certain types of corporations organized under the new "Texas Business Organizations Code" (BOC) to the list of corporations subject to the corporate restrictions in Title 15 of the Election Code. Currently under §253.091 of the Election Code, the corporate restriction applies to corporations organized under the Texas Business Corporation Act, the Texas Non-Profit Corporation Act, federal law, or law of another state or nation. However, beginning on January 1, 2006, businesses no longer organize under the Texas Business Corporation Act or the Texas Non-Profit Corporation Act. Instead, these same type businesses organize under the new BOC.

David A. Reisman, Executive Director, has determined that, for each year of the first five years that the rule is in effect there will be no fiscal implication for the state and no fiscal implication for local government as a result of enforcing or administering the rule as proposed. Mr. Reisman has also determined that the rule will have no local employment impact.

Mr. Reisman has also determined that, for each year of the first five years the rule is in effect, the anticipated public benefit will be clarity in what is required by the law.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses.

Mr. Reisman has further determined that there are no economic costs to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to Natalia Luna Ashley, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

The amendment to §24.1 is proposed under Government Code, Chapter 571, §571.062, which authorizes the commission to adopt rules concerning the laws administered and enforced by the commission.

The amendment to §24.1 affects §253.091 of the Election Code.

§24.1. Corporations and Certain Associations Covered.

(a) This chapter applies to:

(1) - (2) (No change.)

(3) corporations that are organized under the Texas Business Organizations Code but that prior to January 1, 2006, would have organized under the Texas Business Corporations Act or the Texas Non-Profit Corporations Act.

(4) [~~(3)~~]the following associations, whether incorporated or not, [~~which~~] for purposes of this chapter are considered to be corporations covered by this chapter:

(A) - (J) (No change.)

(b) - (d) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 5, 2006.

TRD-200606493
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 463-5800

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CHAPTER 50. LEGISLATIVE SALARIES AND PER DIEM

1 TAC §50.1

The Texas Ethics Commission proposes an amendment to §50.1, to set the legislative per diem as required by the Texas Constitution, Article III, §24a. This section sets the per diem for members of the legislature and the lieutenant governor at $139 for each day during the regular session and any special session.

David A. Reisman, Executive Director, has determined that for each odd numbered year of the first five years this rule is in effect there will be a fiscal implication of $178,360 for the state and no fiscal implication for local government as a result of enforcing or administering this rule. This amount may increase if any special sessions are called.

Mr. Reisman also has determined that for each year of the first five years this rule is in effect the public benefit expected as a result of adoption of the proposed rule is a determination, in compliance with the Texas Constitution, of the per diem entitled to be received by each member of the legislature and the lieutenant governor under the Texas Constitution, Article III, §24, and Article IV, §17, during the regular session and any special session.

Mr. Reisman has also determined there will be no direct adverse effect on small businesses or micro-businesses because the rule does not apply to single businesses. Mr. Reisman has further determined that there are no economic cost to persons required to comply with the rule.

The Texas Ethics Commission invites comments on the proposed rule from any member of the public. A written statement should be mailed or delivered to David A. Reisman, Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711-2070, or by facsimile (FAX) to (512) 463-5777. A person who wants to offer spoken comments to the commission concerning the proposed rule may do so at any commission meeting during the agenda item "Communication to the Commission from the Public" and during the public comment period at a commission meeting when the commission considers final adoption of the proposed rule. Information concerning the date, time, and location of commission meetings is available by telephoning (512) 463-5800 or, toll free, (800) 325-8506.

This amendment is proposed under the Texas Constitution, Article III, §24a, and the Government Code, Chapter 571, §571.062.

The amended section affects the Texas Constitution, Article III, §24, Article III, §24a, and Article IV, §17.

§50.1. Legislative Per Diem.

(a) The legislative per diem is $139 [~~$132~~]. The per diem is intended to be paid to each member of the legislature and the lieutenant governor for each day during the regular session and for each day during any special session in 2007 [~~2006~~].

(b) This rule shall be applied retroactively to ensure payment of the $139 [~~$132~~] per diem for 2007 [~~2006~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 5, 2006.

TRD-200606494
David A. Reisman
Executive Director
Texas Ethics Commission
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 463-5800

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PART 10. DEPARTMENT OF INFORMATION RESOURCES

CHAPTER 210. TEXASONLINE

1 TAC §§210.3 - 210.5

The Department of Information Resources (department) proposes new TexasOnline Texas E-Grants rules at 1 TAC §210.3, concerning applicability, purpose and agency responsibilities; §210.4, concerning data elements and format; and §210.5, concerning waivers and blanket exemptions. Proposed §210.3 requires all state agencies, except institutions of higher education, state agencies defined in §531.001(4), Government Code, and state agencies granted an exemption from the requirements by the department, to post a synopsis of all funding opportunities under financial assistance programs at www.dir.state.tx.us/approvals/index, the central website designated by the department. At the time the rule is proposed, those agencies defined in §531.001(4), Government Code, include the Department of Aging and Disability Services, the Department of State Health Services, the Department of Assistive and Rehabilitative Services and the Department of Family and Protective Services. The proposed rule also establishes the responsibilities of each state agency associated with the requirement.

Proposed §210.4, concerning data elements and format, requires state agencies to use the data elements and funding opportunity announcement format posted by the department at www.dir.state.tx.us/approvals/index. Proposed §210.5, concerning blanket exemptions and waivers, describes the waiver process a state agency must employ to seek a waiver from the requirements of §210.3 and §210.4 from the department.

Brian Rawson, Service Delivery Division Director, of the department, has determined that for the first year the proposed rules are in effect there will be no fiscal implications for state and local governments as a result of enforcing or administering the proposed rules.

Mr. Rawson has also determined that for each year of the first five years the proposed rules are in effect the public benefits anticipated as a result of enforcing or administering the rules will be more effective use of public and financial resources and increased information sharing and coordination among affected governmental entities. There will be no effect on small businesses. There are no anticipated economic costs to persons required to comply with the proposed rules.

Comments on the proposed rules may be submitted to Renée Mauzy, General Counsel, Department of Information Resources, 300 West 15th Street, 13th Floor, Austin, Texas 78701, renee.mauzy@dir.state.tx.us for thirty days following publication.

The new rules are proposed under Chapter 2055, Government Code, Subchapter E, Grants Assistance Project, which requires the department to establish an electronic government project to develop an Internet website accessible through TexasOnline through which state agencies post electronic summaries of grant assistance opportunities. The rules are also proposed under §2054.052(a), Government Code, which authorizes the department to adopt rules to implements its responsibilities under Chapter 2054, Government Code; §2054.262, Government Code, which requires the department to adopt rules to implement TexasOnline; and §2054.252(a), Government Code, which requires the department of implement TexasOnline.

No other statutes are affected by these rules.

§210.3. Applicability, Purpose and Agency Responsibilities.

(a) Unless granted a waiver or blanket exemption by the department based on the requirements in §210.5 of this chapter, each state agency, other than institutions of higher education and those state agencies defined in §531.001(4), Government Code, shall develop and electronically announce synopses of announcements of all funding opportunities under financial assistance programs that award discretionary grants, loans, and cooperative agreements using a standard format and a set of common data elements established statewide and posted by the department at www.dir.state.tx.us/approvals/index or such other URL as the department may indicate at www.dir.state.tx.us/approvals/index. The standard format and common data elements shall address the following:

(1) The synopsis shall provide potential applicants with enough information about the funding opportunity to decide whether they are interested in viewing the full announcement;

(2) The synopsis shall provide potential applicants with one or more ways to get the full announcement with the detailed information; and

(3) The synopsis shall provide potential applicants with common data elements that allow the potential applicant the capability to search for state grant opportunities by using one or more of the following: key word(s), date, funding opportunity number, specific agency or name of agency.

(b) The state agency head or his or her designated representative(s) shall:

(1) issue any needed direction to offices that award discretionary grants and cooperative agreements on the requirement to post a synopsis at the Web site/Internet address indicated by the department, including the standard data elements/format. Synopses must follow the format to ensure all required data elements are included;

(2) ensure the synopsis posted at the Web site/Internet address indicated by the department will have full instructions regarding where to obtain the full announcement for the funding opportunity. To further satisfy statutory, regulatory, or the agency's policy requirements, some agencies also may need to announce the funding opportunity in the *Texas Register;* and

(3) establish a funding opportunity number system for all programs that post a synopsis at www.dir.state.tx.us/approvals/index or such other URL as the department may indicate at www.dir.state.tx.us/approvals/index.

§210.4. Data Elements and Format.

Unless granted a waiver or blanket waiver by the department, state agencies, other than institutions of higher education and those state agencies defined in §531.001(4), Government Code, shall follow the standards and use the data elements and funding opportunity announcement format included at www.dir.state.tx.us/approvals/index or such other URL as the department may indicate at www.dir.state.tx.us/approvals/index. State agencies shall continue to post their full announcement at location(s) consistent with applicable statutory requirements and policies. The synopsis shall be posted with universal resource locator (URL) links through which the full announcement can be obtained. A URL link from the synopsis to the full announcement is not necessary for full announcements posted to Grants.gov because the synopsis and full announcement share the same URL. In this event, however, the synopsis must indicate the full announcement can be found at www.dir.state.tx.us/approvals/index or such other URL as the department may indicate at www.dir.state.tx.us/approvals/index.

§210.5. Waivers and Blanket Exemptions.

(a) Under certain circumstances, the department may determine it reasonable to grant a waiver or blanket exemption to a state agency from the requirements of §210.3 and §210.4 of this chapter. A state agency may be exempt from the requirement to post funding opportunities under financial assistance programs for:

(1) announcements of funding opportunities for public assistance; or

(2) single source announcements of funding opportunities issued by an agency which are not specifically directed to a known recipient.

(b) A state agency seeking a waiver shall submit a written request to the department for an exemption from posting the funding opportunities under the financial assistance programs announcement requirement at the beginning of each fiscal year. The state agency shall not take any action on the posting until the requested exemption is approved or denied by the department.

(c) The waiver request must include sufficient documentation to support the validity of the request. The department may request additional information to determine whether the proposed waiver is in the best interest of the state.

(d) Upon review of the request for waiver, the department shall approve or deny the request, in writing. If approved, the approval shall include all pertinent terms and conditions of the exemption. If denied, the department shall provide the basis for its denial.

(e) If the department has not issued a written denial of the exemption request within thirty (30) calendar days of receipt of the request for waiver, the request is deemed approved.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 11, 2006.

TRD-200606599
Renée Mauzy
General Counsel
Department of Information Resources
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 475-4700

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TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 40. CHRONIC WASTING DISEASE

4 TAC §40.5

The Texas Animal Health Commission proposes new §40.5, to Chapter 40, which is entitled "Chronic Wasting Disease" ("CWD"). Previously, the Texas Animal Health Commission proposed the repeal of §40.5 in the August 25, 2006, issue of the *Texas Register* (31 TexReg 6565). At that time, it was the intent of the Commission to amend §40.5 rather than to repeal the rule in its entirety. The Commission intended to delete and/or modify some of the subsections, when in fact the rule was published for proposed repeal. At this time the Commission is proposing a new §40.5 to clarify any confusion. The Commission will further discuss the past history of this rule in the preamble and will also publish comments which were received regarding the proposed repeal. It is the intent of the Commission to adopt both the repeal and new §40.5 simultaneously in February 2007.

The rule was originally adopted by the Commission and published in the December 23, 2005, issue of the *Texas Register* (30 TexReg 8511-8744). The purpose of the rule was to require the registration of Texas premises where commercial elk are maintained. The requirements were coordinated with another proposal for a premises identification program for all livestock species that was proposed at the same time the elk requirements were adopted. However those proposed premises registration requirements were later placed on "hold," and will not be considered in the immediate future by commissioners. The proposal was published for comment in the August 25, 2006, issue of the *Texas Register* (31 TexReg 6565). The Commission

received a number of comments and responded to them below as it seeks to republish the rule as amended and adopted.

In proposing to repeal the requirements for elk, the Commission received a number of written comments and participated in a meeting with stakeholder members of affected industry groups represented by the Texas Exotic Wildlife Association (EWA), the Texas Wildlife Association (TWA), and the Texas Deer Association (TDA). The discussion regarding the rule was fairly broad. Some of the comment letters and feedback from members of EWA that these requirements are negatively impacting the marketability and price of elk.

CWD is a disease that affects certain susceptible cervid species including mule deer, black tail deer, white tail deer elk and moose. In Texas white tail deer are considered indigenous to the state and are under the regulatory jurisdiction of Texas Parks and Wildlife. However, elk are not indigenous to this state and are classified as exotic livestock and fall under the regulatory jurisdiction of the Commission. Unlike white tail deer, elk are fully the private property of the owner and are not subject to the same types of oversight as white tail deer. Captive white-tail deer are under a surveillance program for CWD at the direction of Texas Parks and Wildlife Department.

One commenter stated that the repeal is: "ONE step forward, TWO steps back. To repeal in-state movement requirements for elk, which had included mandatory premises and animal identification, and movement reporting requirements, is not logical. Economic impact will be detrimental when and if CWD is first documented in Texas. In-state movement requirements for elk, and animal I.D. is a must, if you do not have anything to hide. We must weed the bad seeds out, and it will take every honest rancher out there to do that. One bad seed is all it takes to transport CWD."

However, another commenter stated, "I agree with the repeal of the elk monitoring program. I also agree that such a system should be implemented at some point in time. In theory it was a good idea." But, "(t)he reason I agree with the repeal of the program is because of the massive amounts of problems you have incurred. TAHC basically shoved this program down producers throats and didn't have the staff or funds to accomplish such a task."

The Commission received written response from several associations which expressed their opinions and/or concerns for various options.

EWA through a Board member sent a comment letter in support of changes to the rule that address the following issues: 1.) Identify the Elk moved with a unique tag; 2.) Request that the seller keep the record of sale for five years; 3.) Regard the sale ticket of an auction barn as a one way permit to terminal ranches; and 4.) Encourage Elk producers to test, for CWD, Elk that die of natural or unnatural causes, whenever possible.

TWA remains in favor of reasonable and responsible testing of elk for CWD, brucellosis, TB, etc., and would strongly support a proposal to this effect. Elk are not tested for any of these serious and contagious diseases at sale or other intrastate movement. Elk commonly commingle with deer and livestock on Texas ranches, putting at risk our livestock producers and the state's $3.6 billion hunting business, much of that predicated on white-tailed deer. TWA also agrees with the resolution of this group to support the proposed Commission action to remove the requirement and fee for Premises ID at this time, and support a program proposed by EWA requiring producers only upon movement of elk to provide individual animal identification as described above, and require the retention of records reporting movement at sale or transfer for review by TAHC. Penalties would be strictly enforced in failing to do so. We remain very concerned that totally voluntary testing of elk for CWD will remain less than is necessary, and recommend that the TAHC either establish a science-based target for testing or direct the CWD Task Force in association with TAHC staff and EWA propose a solution that is mutually agreeable.

TDA had submitted comments to the Commission at the last Commission meeting which laid out their position. They recognize the burden that the elk industry is going through in order to follow the rules, but feel that the rules are necessary in order to have level assurances that this species is not putting the multi-billion dollar whitetail hunting and breeding industry at risk. They also addressed concerns raised by elk breeders and raisers that the decrease in financial value of their animals is not a valid reason to not comply with the requirements. They note that they had understood that the elk breeders had committed to a goal of testing 300 elk per year for CWD, but that was not accomplished. They asked the Commission to not rescind the current monitoring requirements contained in this section.

The Texas and Southwestern Cattle Raisers Association (TSCRA) sent a letter supporting regulations that promote the health and welfare of all Texas livestock and suggested that these regulations should not be revoked. They feel that unregulated movement of elk through Texas poses considerable risk to the health of livestock and that any policies proposing removal of the regulations should be seriously reconsidered.

Commission staff believe in the value and importance of creating and maintaining some type of surveillance system in order to trace or track any sick or exposed animal, to determine where the disease originated, and to control or eradicate the disease. A basic foundation for any such system begins with identification on the animal as well as recordkeeping of sales and purchases. These are the core components for any initial surveillance system.

The Commission proposes the repeal of the subsections related to mandatory registration of a premise, payment of a fee for the registration, as well as the requirement to report movement of the elk. However in response to discussion, and in recognition of the need to maintain some type of surveillance system for elk, the Commission proposes maintaining the subsections of the rule which provide for animal identification and recordkeeping. Original subsection (c) becomes new subsection (a) requiring an official identification or electronic device approved by the Commission for animals moved off or onto a premise. Identification of elk moving in commerce is necessary in order to trace animals exposed to a disease. The Commission proposes deleting the word "registered" from that section based on the fact that a premise is not required to be registered; however, unregistered premises are encouraged by the Commission to register. The Commission is removing the reference to "electronic" identification since that is no longer the only acceptable identification devise. The Commission is providing some language to provide on the types of identification that would acceptable for this subchapter. It is referencing the regulatory standards already used by USDA and the Commission.

The Second subsection for modification relates to the requirement to maintain records. In addition to animal identification, maintaining records facilitates surveillance by allowing Commission personnel to determine where an animal originated or where

exposed elk may have gone. As such the Commission maintains original subsection (f) and renumbers it subsection (b). The Commission maintains the requirement that both the buyer and the seller are responsible for maintaining records; this section also deleting the requirement of a Premise Identification Number and deleting the requirement to identify elk solely with an electronic device; however, the Commission still encourages voluntary participation in NAIS and encourages unregistered premises moving elk onto or off the premises to register the premises.

Regarding modifications to the subsection for "Violations" the Commission is removing those stated violations that involved premise registration and movement reporting. However because the Commission is maintaining a requirement to identify elk and keep and provide records the violations associated with that requirement are maintained in the adopted rule.

The current rule contains a voluntary testing standard for elk for CWD. This is an issue that received some comments that it should not be permissible, but rather mandatory. As a practical matter, voluntary testing of elk has not been statistically significant and has created the most concern from various stakeholder associations. There must be adequate test surveillance of elk to address concerns about the potential incursion of Chronic Wasting Disease in Texas. The Commission, at this time, is maintaining the voluntary standard but Commission staff will work to develop an acceptable standard to try and engage a greater statistical sample in testing of elk for CWD.

FISCAL NOTE

Mr. Mike Jensen, Assistant Executive Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no additional fiscal implications for state or local government as a result of enforcing or administering the rule. If USDA were to make the National Animal Identification System mandatory for all states, there would be a fiscal impact; but, that program is currently voluntary in Texas. Implementation of this rule poses no significant fiscal impact on small or micro-businesses that own or transfer ownership of commercial elk. There will be no effect to individuals required to comply with the rule as proposed.

PUBLIC BENEFIT NOTE

Mr. Jensen also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be that commercial elk will be identified and records of elk movement will be maintained by the seller. These two component, identification and records of movements the Commission's ability to quickly respond and control CWD disease issues related to elk.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Government Code, §2001.022, this agency has determined that the proposed rule will not impact local economies.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. These proposed rules are an activity related to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposed new rule may be submitted to Delores Holubec, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.state.tx.us."

STATUTORY AUTHORITY

The new rule is proposed as follows:

The Commission is vested by statute, Texas Agriculture Code, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. If the Commission determines that a disease listed in §161.041 of this code or an agent of transmission of one of those diseases exists in a place in this state among livestock, or that livestock are exposed to one of those diseases or an agent of transmission of one of those diseases, the Commission shall establish a quarantine on the affected animals or on the affected place. That is found in §161.061. As a control measure, the Commission by rule may regulate the movement of animals. The Commission may restrict the intrastate movement of animals even though the movement of the animals is unrestricted in interstate or international commerce. The Commission may require testing, vaccination, or another epidemiologically sound procedure before or after animals are moved. That is found in §161.054. That authority is found in §161.048. A person is presumed to control the animal if the person is the owner or lessee of the pen, pasture, or other place in which the animal is located and has control of that place; or exercises care or control over the animal. That is under §161.002.

No other statute, article or code is affected by the proposal.

§40.5. Identification and Recordkeeping Requirements for Elk.

(a) Elk moved onto or off of a premises shall be individually identified, with an official identification device which may include an eartag that conforms to the USDA alphanumeric national uniform eartagging system, an animal identification number (AIN) such as an RFID ear tag, or other identification methods approved by the Commission.

(b) The buyer and seller must maintain records for all elk purchased, or sold, and provide those to commission personnel upon request. Records required to be kept under the provisions of this section shall be maintained for not less than five (5) years. The records shall include the following information:

(1) Owner's name;

(2) Location where the animal was sold or purchased;

(3) Official ID and/or Ranch tag (additional field for retag);

(4) Gender/age of animal;

(5) Source of animal (if purchased addition);

(6) Movement to another premises;

(7) Disposition.

(c) Elk located within the state that die of natural or unnatural causes or are harvested by hunting or slaughter should be tested for Chronic Wasting Disease.

(d) Violations

(1) To buy, sell, move or transport elk that are not identified with an official individual identification device.

(2) Remove an official identification device from any elk.

(3) Failure to keep and maintain records as required by this section.

(4) Failure or refusal to make records available to commission staff upon request for such records.

(5) Violations can be handled, as appropriate, under §161.148 of the Texas Agriculture Code.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 11, 2006.

TRD-200606603
Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 719-0700

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CHAPTER 41. FEVER TICKS

4 TAC §41.6, §41.20

The Texas Animal Health Commission (Commission) proposes amendments to Chapter 41, §41.6 and 41.20, concerning Fever Ticks. This proposal clarifies a treatment requirement in §41.6. and modifies the Tick Eradication Quarantine line in Starr County as provided for in §41.20.

Chapter 167 of the Texas Agriculture Code, entitled "Tick Eradication," directs the Commission to eradicate all ticks capable of carrying Babesia in this state and requires the Commission to protect all land, premises, and livestock in this state from exposure to those ticks. Per §167.006, captioned *Designation of Tick Eradication Area,* any county or part of a county that may contain ticks, as determined by the Commission, may be designated for tick eradication by the Commission.

The Texas Cattle Fever Tick Eradication Program (TCFTEP), operated by the United States Department of Agriculture was established to prevent the spread of *Boophilus* fever ticks from a tick eradication quarantine area, preventative quarantine area, or control purpose quarantine area to a free area. The Commission has, by rule, established a permanent quarantine area for the purpose of detecting and eradicating Fever Ticks. It is comprised of a narrow band extending through eight South Texas counties along the Rio Grande, beginning at Del Rio and ending at Brownsville.

The fever ticks, scientifically known as the *Boophilus annulatus* and *B. microplus,* are capable of carrying protozoan parasites, *Babesia bovis* and *B. bigemina* (Texas Fever) that cause death in up to 90 percent of the affected cattle. Both fever ticks and babesiosis are prevalent in Mexico. Fever ticks are brought into Texas from Mexico on estray or smuggled livestock and on wildlife, such as white-tailed deer that can serve as a host for the *Boophilus* ticks. Movement of deer from the quarantine area or quarantined premises could promote and propagate the spread of these ticks.

The Tick Quarantine Eradication boundary as currently defined by the existing requirements in Starr County begins where U.S. Highway 83 intersects the Zapata-Starr County line; it then follows fences through and past the Falcon State Park for approximately seven miles before reconnecting with U.S. Highway 83 in a southeasterly direction to the south fence of the M. Ramirez Pasture at the north city limits of Roma. The current configuration of that part of the quarantine line is difficult to manage as a quarantine line and is not an effective barrier for preventing exposure to ticks. Tick exposure has occurred outside the quarantine line just north of this area in Zapata County and south of the area in Falcon Heights and Chapeno.

The Commission proposes using the highway, U.S. Highway 83, as the boundary. This would be a clearer quarantine line to demark and also serves as a far more effective barrier than a fence A clearer boundary would address the problem with the current boundary that is impacted by the shrinking level of Falcon Lake which has been used as a buffer; the lower water level in the reservoir has allowed for more excursions of livestock from Mexico with a greater risk for carrying ticks. Finally, the change in the line will make it easier for individuals to determine the location of the Quarantine Area.

Language is being added to §41.6(b)(1) to clarify the requirement regarding treatment to state that it must be through a swim vat so as to clarify that spray dipping is not acceptable for animals under that requirement.

FISCAL NOTE

Mr. Mike Jensen, Deputy Director for Administration and Finance, Texas Animal Health Commission, has determined for the first five-year period the rules are in effect, there will be no significant fiscal implications for state or local government as a result of modifying this rule to clarify the quarantine zone boundary. There will be no effect to individuals required to comply with the rules as proposed. There will be no affect to small or micro businesses.

PUBLIC BENEFIT NOTE

Mr. Jensen also has determined that for each year of the first five years the rules are in effect, the public benefit anticipated as a result of enforcing the rules will be greater clarity in identifying the quarantine zone and greater stability in the boundary lines.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Government Code, §2001.022, this agency has determined that the adopted rule will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. These rules are an activity related to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC, §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007. A Takings Impact Assessment was done in order to evaluate the impact of the quarantine line on private real property.

REQUEST FOR COMMENT

Comments regarding the proposed amendments may be submitted to Delores Holubec, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.state.tx.us."

STATUTORY AUTHORITY

The amendments are proposed under the Texas Agriculture Code, Chapter 167, §167.003, which provides for general powers and duties of the commission to eradicate fever ticks and provides authority for adopting the necessary rules to fulfill those duties. Section 167.004 authorizes the commission by rule to define what animals can be classified as exposed to ticks. Section 167.006 authorizes the commission to designate for tick eradication any county or part of a county that the Commission believes contains ticks. Section 167.007 authorizes the Commission to conduct tick eradication in the free area. Section 167.021, entitled "General Quarantine Power" provides that "(t)he commission may establish quarantines on land, premises, and livestock as necessary for tick eradication." Section 167.022, entitled "Quarantine of Tick Eradication Area" provides the commission authority designating a county or part of a county for tick eradication. Section 167.023, entitled "Quarantine of Free Area" provides the commission authority to establish quarantine in the Free Area. Section 167.024, entitled "Movement In or From Quarantined Area" provides the requirement to get appropriate authorization and compliance with the requirements prior to movement.

No other statutes, articles or codes are affected by the proposed amendments.

§41.6. Restrictions on movement of livestock.

(a) (No change.)

(b) Movement is restricted from leaving a tick eradication quarantine area, temporary preventative quarantine area, or control purpose quarantined area. The owner or caretaker of livestock located in a tick eradication quarantine area, temporary preventative quarantine area, or control purpose quarantine area shall not move, or allow the movement of, any livestock from the area without a permit or certificate for movement issued by an authorized representative of the commission. No person may accept a shipment of livestock from a tick eradication quarantine area, temporary preventative quarantine area, or control purpose quarantine area, unless the livestock are accompanied by an original permit or certificate for movement.

(1) Movement from an infested premise or exposed premise. A certificate for movement will be issued after the livestock, if moving directly to slaughter by sealed conveyance, have had two consecutive dips not less than seven nor more than 14 days apart without scratch inspection unless required by §41.8 of this title (relating to Dipping of Livestock); or have had two dips not less than seven days nor more than 14 days apart, with each dip following a scratch inspection that does not reveal ticks; or have been dipped through a swim vat following a scratch inspection and not less than 12 days nor more than 14 days after being [~~later~~] dipped through a swim vat following a scratch inspection that does not reveal ticks.

(2) (No change.)

(c) (No change.)

§41.20. Quarantined areas: Starr County.

Quarantined areas are as follows for Starr County. Beginning at a point where U.S. Highway 83 intersects the Zapata-Starr County line and following [~~a fence along the Zapata-Starr County line in a southwesterly direction to where it intersects the east fence of the Falcon State Park, approximately 3 3/4 miles; thence, following the east fence of the Falcon State Park in a southeasterly direction to a corner, approximately one mile; thence, following the same fence in an easterly direction to a corner, approximately 100 yards; thence, following the same fence in a southerly direction to a corner, approximately 100 yards; thence, following the same fence in an easterly direction to a cattle guard at the entrance of Falcon State Park at Old U.S. Highway 83, approximately .4 mile; thence, across Park Road 46 at the entrance to Falcon State Park on Old U.S. Highway 83 and following the park enclosure fence in a southerly direction to a corner, approximately 100 yards; thence, following Falcon State Park fence in a westerly direction to a corner; approximately .4 mile; thence, following the same fence in a southerly direction to where it intersects the north fence of the IBWC compound, approximately .5 mile; thence, following the IBWC compound north fence in an easterly direction to its intersection with Old U.S. Highway 83, approximately .4 mile; thence, following Old U.S. Highway 83, also known as FM Road 2098, south and southeast to its junction with the present U.S. Highway 83, approximately 4 1/4 miles; thence, following~~] U.S. Highway 83 in a southeasterly direction to the south fence of the M. Ramirez Pasture at the north city limits of Roma, approximately 17 [~~9.5~~] miles; thence, following the south fence of the M. Ramirez Pasture in a northeasterly direction to where it intersects the west fence of the G. Madrigal Ranch, approximately .4 mile; thence, following the meanderings of the west fence of the G. Madrigal Ranch in a southeasterly direction, around the east side of the R. Pena addition to the City of Roma to a dirt road, approximately .9 mile; thence, following the same dirt road in a southerly direction to where it intersects U.S. Highway 83 at the Roma Graveyard, approximately .3 mile; thence, following the north side of D.S. Highway 83 in an easterly direction through Rio Grande City to its intersection with Loop 83, approximately 18 miles; thence, following the north side of Loop 83 in an easterly direction to its intersection with the MP Railroad right-of-way, approximately 3.5 miles; thence, following the north side of MP Railroad in an easterly direction to the Starr-Hidalgo County Line, approximately 13 miles.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 719-0700

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CHAPTER 43. TUBERCULOSIS
SUBCHAPTER D. MOVEMENT RESTRICTION ZONE (MRZ)

4 TAC §43.30

The Texas Animal Health Commission (Commission) proposes amendments to Chapter 43, Subchapter D, concerning the Eradication of Tuberculosis, §43.30. Subchapter D provides for two different zones or areas within the state of Texas in compliance with federal requirements regarding tuberculosis in cattle and bison.

USDA authorized Texas to establish different zones within the state based on risk classifications. In order to address the tuberculosis risk associated with the area located in and around the city of El Paso, Texas the Commission created a separate zone, or area, for El Paso and Hudspeth counties due to the

prevalence of tuberculosis in that area. The rules for that area establish movement criteria both in and out of the zone as well as distinctions on who qualifies for any different standards; the purpose of the rules was to allow the rest of Texas to achieve Tuberculosis Free status through the creation of the zone.

On September 29, 2006 USDA published in the *Federal Register* an interim rule amending its bovine tuberculosis regulations regarding State and zone classifications. In that publication, USDA determined that all of Texas, including the zone defined in Subchapter D, satisfies the criteria for a state tuberculosis designation as accredited-free. Therefore, USDA improved the state of Texas tuberculosis designation from modified accredited advanced to accredited-free.

The classification designation by USDA declaring Texas as an accredited free state frees the state from the tuberculosis testing requirements for Texas cattle moving interstate. As a result, the Commission proposes to remove those requirements regarding movement as currently stated in §43.31(b) and (c). However, the Commission is maintaining the remainder of the requirements relative to the zone for the purpose of doing surveillance to ensure that the state maintains a Tuberculosis Free Status.

FISCAL NOTE

Mr. Mike Jensen, Assistant Executive Director of Administration, Texas Animal Health Commission, has determined for the first five-year period the rule is in effect, there will be no significant additional fiscal implications for state or local government as a result of enforcing or administering the rule. Although the proposed rule removes the movement requirements, surveillance activities will continue for this program. There will be no effect to individuals required to comply with the rule as proposed. Implementation of this rule poses no significant fiscal impact on small or micro-businesses.

PUBLIC BENEFIT NOTE

Mr. Jensen also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be a reduction in movement requirements related to this animal health program thereby supporting one facet of the agency's mission of increasing the marketability of Texas livestock at the state, national, and international levels. Continuation of surveillance is to continue to protect the animal industries, to promote and ensure animal health and productivity, and to protect human health from animal diseases that are transmissible to people.

LOCAL EMPLOYMENT IMPACT STATEMENT

In accordance with Government Code, §2001.022, this agency has determined that the proposed rule will not impact local economies and, therefore, did not file a request for a local employment impact statement with the Texas Workforce Commission.

TAKINGS ASSESSMENT

The agency has determined that the proposed governmental action will not affect private real property. These proposed rules are an activity related to the handling of animals, including requirements concerning testing, movement, inspection, identification, reporting of disease, and treatment, in accordance with 4 TAC §59.7, and are, therefore, compliant with the Private Real Property Preservation Act in Government Code, Chapter 2007.

REQUEST FOR COMMENT

Comments regarding the proposed amendments may be submitted to Dolores Holubec, Texas Animal Health Commission, 2105 Kramer Lane, Austin, Texas 78758, by fax at (512) 719-0721 or by e-mail at "comments@tahc.state.tx.us."

STATUTORY AUTHORITY

The amendments are proposed under the Texas Agriculture Code, Chapter 161, §161.041(a) and (b), and §161.046 which authorizes the Commission to promulgate rules in accordance with the Texas Agriculture Code. Also §161.054 authorizes the commission to regulate by rule the movement of animals. This is further supported by §161.081 which authorizes the commission to regulate the entry of such livestock into Texas from another state. Section 162.009 authorizes the commission to examine, test and retest any cattle as necessary. Section 161.057 authorizes the commission to adopt rules which may prescribe criteria for classifying areas in the state for disease control. The commission may prescribe different control measures and procedures for areas with different classifications.

No other statutes, articles, or codes are affected by the amendment.

§43.30. Special Requirements for Movement Restriction Zone (MRZ).

[~~(a)~~] Definition of Zone Boundaries: The Movement Restriction Zone ("MRZ") is defined as a geographic area which includes an Affected Area, where bovine tuberculosis occurs or has historically occurred, and a Surveillance Area where the disease has not been detected, but which serves as a buffer area between the Affected Area and the Free Zone of Texas. The boundaries of the referenced zones and areas are as follows:

(1) MRZ: The area of El Paso County and Hudspeth County which lies within the boundaries established by the Rio Grande River on the West; Loop 375 to FM 659 to US 62/180 on the North; the El Paso County line to I-10 to Spur 148 at Ft Hancock on the East; and Spur 148 to the Rio Grande River on the South.

(A) Affected Area within the MRZ: The area of the MRZ in El Paso County which lies west of I-10, as defined above.

(B) Surveillance Area within the MRZ: The area of the MRZ in El Paso County which lies east of I-10, and all of the MRZ in Hudspeth County, as defined above.

(2) Free Zone: The area of Texas not included in the MRZ.

~~[(b) The movement of livestock out of the MRZ must be strictly controlled. The movement of all cattle, bison, goats, captive cervids, exotic bovids, and camelids shall be documented on a movement certificate issued by an authorized representative of the State or Federal government. (Accepted documents include VS Form 1-27 permits, Certificates of Veterinary Inspection, and state approved certificates for intrastate movement). The certificate shall include an official identification of each animal in the consignment, and the date and results of tuberculosis tests as specified below.]~~

~~[(1) Breeding animals, including cattle, bison, goats, exotic bovids, and camelids, shall be negative to a tuberculosis test within 60 days of movement. Animals from an Accredited herd are exempt from this test requirement.]~~

~~[(2) Feeder animals, including steers, spayed heifers, and heifers restricted to designated feedlots, may be moved without a tuberculosis test.]~~

~~[(3) Slaughter animals may be moved directly to a state or federally inspected slaughter establishment without a tuberculosis test.]~~

~~[(4) Captive cervids must meet the following test requirements for movement from the MRZ:]~~

~~[(A) Animals from Accredited herds may be moved without a tuberculosis test.]~~

~~[(B) Animals from Qualified or Monitored herds shall be negative to a tuberculosis test within 90 days of movement.]~~

~~[(C) Animals less than 12 months of age that originate from an Accredited, Qualified, or Monitored herd, may be moved without a tuberculosis test.]~~

~~[(D) Animals from all other herds shall be negative to two tuberculosis tests conducted at least 90 days apart, with the second test conducted within 90 days of movement. In addition, the animals in a consignment must be separated from all other members of the herd during the testing period.]~~

~~[(c) Importation of cattle, bison, goats, captive cervids, exotic bovids, and camelids into the MRZ:]~~

~~[(1) To a market - All such livestock will keep the tuberculosis status of the Tuberculosis Free Zone if they are maintained separately from restricted animals originating within the MRZ . To maintain this status, they must be moved directly out of the MRZ from the market within three days of sale with the appropriate movement certificates. Specific arrangement of pens and facilities necessary to provide effective biosecurity must be approved by a representative of the Commission.]~~

~~[(2) To a farm - Animals will assume the lower status of the MRZ, or they must comply with status of the herd, if it is different (e.g. accredited free in the MRZ.)]~~

~~[(3) Captive Cervidae cannot be moved into the MRZ unless they are accompanied by a Certificate of Veterinary Inspection verifying they have been tested twice for tuberculosis at least 90 days apart, or tested as per interstate movement requirements stated in 9CFR, Part 77 and are negative (these requirements are summarized in subsection (b)(4) of this section).]~~

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 11, 2006.

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Gene Snelson
General Counsel
Texas Animal Health Commission
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 719-0700

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TITLE 16. ECONOMIC REGULATION

PART 1. RAILROAD COMMISSION OF TEXAS

CHAPTER 18. UNDERGROUND PIPELINE DAMAGE PREVENTION

16 TAC §§18.1 - 18.12

The Railroad Commission of Texas proposes new §§18.1 - 18.12, relating to Scope, Applicability, and General Provisions; Definitions; Excavator Notice to Notification Center; Excavator Obligation to Avoid Damage to Underground Pipelines; Operator and Excavator Obligations with Respect to Positive Response; General Marking Requirements; Excavator Marking Requirements; Operator Marking Requirements; Options for Managing an Excavation Site in the Vicinity of an Underground Pipeline; Excavation within Tolerance Zone; Reporting Requirements; and Penalty Guidelines, in new Chapter 18, entitled Underground Pipeline Damage Prevention.

The proposed new rules implement the authority of the Commission under Texas Natural Resources Code, §117.012, and Texas Utilities Code, §121.201 (as amended by House Bill 2161, Acts 2005, 79th Leg., R.S., ch. 267, §§6 and 13, eff. Sept. 1, 2005). As amended, Texas Natural Resources Code, §117.012, provides that the Commission shall adopt rules that include safety standards for and practices applicable to the intrastate transportation of hazardous liquids or carbon dioxide by pipeline and intrastate hazardous liquid or carbon dioxide pipeline facilities, including safety standards related to the prevention of damage to such a facility resulting from the movement of earth by a person in the vicinity of the facility, other than movement by tillage that does not exceed a depth of 16 inches. As amended, Texas Utilities Code, §121.201(a)(1), states that the Commission may by rule prescribe or adopt safety standards for the transportation of gas and for gas pipeline facilities, including safety standards related to the prevention of damage to such a facility resulting from the movement of earth by a person in the vicinity of the facility, other than movement by tillage that does not exceed a depth of 16 inches. Both provisions impose a limitation on the Commission's rulemaking authority by stating that the Commission may not implement rules adopted under the new legislation until September 1, 2007.

In addition, by proposing the new rules in Chapter 18, the Commission is implementing the authority delegated by and under Texas Health and Safety Code, §756.106 (as added by Senate Bill 9, Acts 2005, 79th Leg., R. S., ch. 1337, §19, and editorially renumbered as Health and Safety Code, §756.126). This new provision states that the Commission shall adopt and enforce safety standards and best practices, including those described by 49 U.S.C. Section 6105 *et seq*., relating to the prevention of damage by a person to a facility under the jurisdiction of the Commission. This legislation requires the Commission to adopt the safety standards and best practices required by Health and Safety Code, §756.126, not later than June 1, 2007. As currently drafted, the proposed new rules in Chapter 18, with some stated exceptions, would apply to all persons engaged in or preparing to engage in the movement of earth in the vicinity of an intrastate underground pipeline containing flammable, toxic, or corrosive gas, a hazardous liquid, or carbon dioxide. However, the legislation amending Texas Natural Resources Code, §117.012, and Texas Utilities Code, §121.201, specifically authorizes the Commission to exempt other entities or occupations if the Commission determines in its rulemaking process that exempting those entities or occupations from the rules is either in the public interest or not likely to cause harm to the safety and welfare of the public. The Commission gives notice that one result of this rulemaking may be the exemption of additional entities and/or activities from the new rules in Chapter 18.

Although there are some specific requirements for both excavators and pipeline operators set forth in the proposed new rules, generally the Commission attempted to avoid provisions that

would either duplicate or contradict the mandates of Texas Utilities Code, Chapter 251, the Underground Facility Damage Prevention and Safety Act. The requirements in the proposed new rules are based on the presumption that an excavator will notify a notification center pursuant to, and that a pipeline operator will respond in accordance with, the provisions of Texas Utilities Code, Chapter 251, and the requirements of the notification center. However, compliance with the provisions of Texas Utilities Code, Chapter 251, and the requirements of a notification center does not necessarily constitute compliance with the requirements of this chapter. Further, there may be persons exempt from the provisions of Texas Utilities Code, Chapter 251, that would be required to comply with this chapter. The proposed new rules would not apply to the exemptions set forth in Texas Utilities Code, §251.003; the movement of earth that does not exceed a depth of 16 inches; or surface mining operations. The proposed new rules would apply to movement of earth by tillage that exceeds a depth of 16 inches.

Proposed new §18.1, relating to Scope, Applicability, and General Provisions, sets out the source of the Commission's statutory authority to adopt and enforce the rules, in subsection (a). Also stated, in subsection (b), is the presumption that an excavator will notify a notification center pursuant to, and that a pipeline operator will respond in accordance with, the provisions of Texas Utilities Code, Chapter 251, and the requirements of the notification center. However, compliance with the provisions of Texas Utilities Code, Chapter 251, and the requirements of a notification center does not necessarily constitute compliance with the requirements of this chapter. Further, subsection (c) makes clear that there may be persons exempt from the provisions of Texas Utilities Code, Chapter 251, that must comply with this chapter. Subsection (d) lists the activities to which this chapter does not apply: the exemptions in Texas Utilities Code, §251.003; the movement of earth that does not exceed a depth of 16 inches; or surface mining operations. Subsection (e) expressly states that this chapter applies to movement of earth by tillage that exceeds a depth of 16 inches.

Additional general provisions are set forth in subsections (f) through (i). Subsection (f) states that unless otherwise specified, all time periods used in this chapter are to be calculated from the time the original notification is given to the notification center. Subsection (g) provides that unless otherwise specified, all time periods are stated in working days. Subsection (h) states that unless an excavator and an operator otherwise expressly agree, the life of a line locate ticket shall be 14 days. Finally, subsection (i) provides that unless otherwise expressly stated, each excavator and each operator must retain required records for at least four years. All records made pursuant to this chapter are subject to inspection by the Commission for compliance with this chapter.

Proposed new §18.2 gives definitions for 25 words or terms. Some of the more significant words and terms defined include the word "damage," proposed to be defined as including but not limited to defacing, scraping, displacement, penetration, destruction, or partial or complete severance of an underground pipeline or of any protective coating, housing, or other protective device of an underground pipeline; weakening of structural or lateral support of an underground pipeline that affects the integrity of the pipeline; or failure to properly replace the backfill surrounding an underground pipeline.

The Commission proposes to define "demolish or demolition" as any operation by which a structure or mass of material is wrecked, razed, rendered, moved, or removed by means of any tools, equipment, or discharge of explosives.

The Commission proposes to define the word "emergency" as a sudden or unexpected occurrence involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.

The word "excavate" is proposed to be defined as movement of earth by any means.

The Commission proposes to define "locate ticket, line locate ticket, or ticket" as the record of the notice of intent to excavate given by an excavator to a notification center in conformance with Texas Utilities Code, §§251.151 and 251.152.

The Commission proposes to define "movement of earth" as any operation in which earth, rock, or other material in the ground, any structure, or any mass of material is moved, removed, disturbed, or otherwise displaced by hand digging, mechanized equipment or tools of any kind, or explosives, and includes but is not limited to augering, backfilling, boring, cable or pipe plowing and driving, compressing, cutting, demolition, digging, ditching, dragging, dredging, drilling, grading, plowing-in, pulling-in, razing, rendering, ripping, scraping, tilling of earth at a depth exceeding 16 inches, trenching, tunneling, or wrecking.

The term "notification center" is proposed to be defined as a legal entity established and operated pursuant to Texas Utilities Code, Chapter 251.

The Commission proposes to define "notify, notice, or notification" as the completed delivery of information to the person to be notified, and the receipt of that information by that person in accordance with this chapter. The delivery of information includes but is not limited to the use of any electronic or technological means of data transfer.

The term "person" is proposed to be defined as any individual, operator, firm, joint venture, partnership, corporation, association, municipality, or other political subdivision, governmental unit, department or agency, and includes any trustee, receiver, assignee, or personal representative thereof.

The Commission proposes to define "positive response" as notification, markings left at an excavation site, or other shared or transmitted information that allows an excavator to know prior to the beginning of excavation that underground pipelines have been located and marked or that there are no underground pipelines in the vicinity of the planned excavation.

The term "tillage" is proposed to be defined as the manipulation of soil into a desired condition in preparation for planting and the cultivation by loosening or breaking up of soil around growing plants by hand digging or by use of a moldboard, disk, rotary, chisel or subsoil plow, a cultivator, a harrow, or a tiller.

"Tolerance zone" is proposed to be defined as half the width of the underground pipeline plus a minimum of 18 inches on either side of the outside edge of the underground pipeline on a horizontal plane.

The Commission proposes to define "white-lining" as an excavator's designation on the ground of the area to be excavated using white paint, white flags, white stakes, or any combination of these.

Proposed new §18.3 sets forth general requirements for an excavator. Subsections (a) and (b) provide that an excavator must

request the location of underground pipelines at each planned excavation site by giving notice to the notification center as required by Texas Utilities Code, Chapter 251, and must include in the notice the method or methods by which the excavator will receive a positive response.

Subsection (c) states that when an excavation site cannot be clearly identified and described on a line locate ticket, the excavator must use white-lining to mark the excavation area prior to giving notice to the notification center and before the locator arrives on the excavation site. Subsection (d) provides that if an excavation project is too large to mark using white-lining or is so expansive that a full description cannot be provided on a line locate ticket, then the operator and the excavator must conduct a face-to-face meeting to discuss the planned excavation activities and to establish protocols for the interval between each notice to the notification center; the scope of each line locate ticket; and the life of each line locate ticket.

If an excavation project is not completed at the time a line locate ticket expires, then subsection (e) would require the excavator to refresh the ticket by giving notice to the notification center again; however, a request to refresh may be limited to the area yet to be excavated.

Subsection (f) would allow an excavator and an operator to agree that the life of a line locate ticket is more than 14 days provided that the agreement is in writing and the agreement is signed and dated by both the excavator and the operator. In that event, subsection (g) would require both the excavator and the operator to retain a copy of any such agreement.

Proposed new §18.4 sets forth general and specific requirements for excavators. Subsection (a) requires an excavator to comply with the requirements of §18.3, relating to Excavator Notice to Notification Center, and Texas Health & Safety Code, Subchapter H, relating to Construction Affecting Pipeline Easements and Rights-of-Way; and to plan an excavation in such a manner as to avoid damage to and minimize interference with all underground pipelines in the vicinity of the excavation area and shall take all reasonable steps to protect underground pipelines from damage.

Subsection (b) specifically requires an excavator to wait the time required by Texas Utilities Code, Chapter 251, before beginning excavation. Further, subsection (c) requires that, prior to excavation, an excavator must confirm that a copy of a valid locate ticket for the location is in the possession of the excavator's designated representative and can be obtained from the representative or can be provided within one hour of a request from the operator or the Commission.

Subsection (d) requires that, prior to excavation, an excavator must verify that it is at the correct location as specified on the locate ticket; verify white-lining; and, to the best of the excavator's ability, check for any unmarked underground pipelines. Checking for unmarked underground pipelines includes, for example, looking for additional pipeline line markers, aboveground pipeline valves, and regulator stations.

Subsection (e) requires that an excavator not begin excavating until a second notice is given to the notification center for the area if the excavator has knowledge of the existence of an underground pipeline and has received an "all clear" or a "no conflict" response from an operator; the excavator observes clear evidence (such as a line marker or an above-ground fixture) of the presence of an unmarked underground pipeline in the area of the proposed excavation, and has received an "all clear" or a "no conflict" response from an operator; there is no positive response for the excavation area; or the positive response is unclear or obviously erroneous (for example, for a different location or for a different type of underground facility).

Subsection (f) provides that if an excavator has given a second notice and there is no positive response within four hours, the excavator may begin excavating.

Subsection (g) requires an excavator to protect and preserve locate markings from the time the excavator begins work until markings are no longer required for the proper and safe excavation in the vicinity of all underground pipelines.

Proposed new §18.5 establishes specific requirements for operators. Subsection (a) requires that, upon being contacted by the notification system, an operator must provide a positive response within the time frames specified in Texas Utilities Code, Chapter 251, by either marking the operator's underground pipelines in accordance with the requirements of Texas Utilities Code, Chapter 251, and this chapter or notifying the excavator that the operator has no underground pipelines in the vicinity of the proposed excavation area. The operator must provide this "all clear" or "no conflict" notice using the method or methods that the excavator specified in accordance with §18.3, relating to Excavator Notice to Notification Center.

Subsection (b) requires both the excavator and the operator to make a record of the positive response regarding each line locate ticket received. Subsection (c) obligates an excavator that gives a second notice to the notification center because an operator failed to provide a positive response to an excavator to report that fact to the Commission.

Proposed new §18.6 sets forth general marking requirements. Subsection (a) establishes the minimum standard that all markings must conform with the requirements of American Public Works Association (APWA) Uniform Color Code (ANSI Standard Z535.1, Safety Color Code). Subsection (b) requires that markings be valid for an excavation site for 14 days from the time a positive response is given, unless the markings were placed in response to an emergency and the emergency condition has ceased to exist. If a line locate ticket has been refreshed, then the operator must either ensure that markings are still valid or re-mark. Subsection (c) provides that if the use of line marking is considered damaging to property (driveways, landscaping, historic locations to the extent boundaries are known), a locator must use spot marking or another suitable marking method or methods.

Proposed new §18.7 pertains to excavator marking requirements. Subsection (a) reiterates that, prior to giving notice to a notification center, an excavator must mark the specific excavation area using white paint (if applicable), flags, or stakes, whichever is most visible for the terrain. Subsection (b) requires an excavator to mark the area of excavation using intervals that show the direction of the excavation.

Proposed new §18.8 concerns operator marking requirements. Subsection (a) requires a locator to use all information necessary to mark underground pipelines accurately. Subsection (b) directs locators to mark the approximate center line of an underground pipeline. Subsection (c) provides that if, in the process of marking an underground pipeline, a locator discovers a customer-owned underground pipeline, the locator must make a reasonable effort to advise the excavator of the presence of the customer-owned underground pipeline.

Subsection (d) requires that where a proposed excavation crosses an underground pipeline, markings must be at intervals that clearly define the route of the underground pipeline, to the extent possible. Subsection (e) specifies that a locator must mark underground pipelines by means of stakes, paint, flags, or a combination of two or more of these. The terrain, site conditions, and type and extent of the proposed excavation must be considered in determining the most suitable means for marking underground pipelines. Subsection (f) directs that a locator must mark at sufficient intervals to indicate clearly the approximate horizontal location and direction of the underground pipeline or pipelines. The distance between any two marks indicating the same line shall not exceed 20 feet; however, a shorter distance between marks may be necessary because of site conditions or directional changes of the underground pipeline. Subsection (g) provides that markings of an underground pipeline greater than six inches in nominal outside dimension must include the size in inches at every other mark. As stated in subsection (h), a locator must extend all markings, if practical, at least one additional mark beyond the boundaries of the specific location of the proposed work as detailed on the line locate ticket. Finally, subsection (i) states that a locator must make paint marks approximately eight to ten inches in length and one to two inches in width except when spot marking is necessary, and must make a minimum of three separate marks for each underground pipeline marking.

Proposed new §18.9 provides excavators and operators with options for managing an excavation site in the vicinity of an underground pipeline. Subsection (a) provides that after complying with the notice requirements of §18.3, an excavator and an operator may jointly establish the protocols applicable to an excavation site in the vicinity of underground pipelines based on the particular characteristics of each job. These protocols applicable to an excavation site may designate the contact person or persons for each entity working at an excavation site; establish the required mode or modes of communication among all entities working at an excavation site, e.g., telephone or other electronic means or face-to-face meetings at prescribed times or intervals; provide the method for coordinating work activities among all entities working at an excavation site; provide for the ownership and/or possession of the locate ticket or tickets; declare which entity or entities must have the locate ticket or locate ticket number before beginning work; state the life of a locate ticket and the circumstances that require refreshing the locate ticket; designate the extent of the tolerance zone, provided that it shall not be less than 24 inches, and the type of excavation permitted within the tolerance zone; and provide for any other agreement with respect to excavation activities and/or marking requirements that will or will tend to ensure the proper and safe excavation in the vicinity of an underground pipeline. Subsection (b) requires that if an excavator and an operator jointly establish protocols pursuant to this section, both must make and retain a record of the agreement.

Proposed new §18.10 applies to excavations within a tolerance zone. Subsection (a) reiterates the excavator's obligation to comply with the requirements of Texas Health & Safety Code, Subchapter H, relating to Construction Affecting Pipeline Easements and Rights-of-Way. Subsection (b) provides that when excavation is to take place within the specified tolerance zone, an excavator must exercise such reasonable care as may be necessary for the protection of any underground pipeline in or near the excavation area. Methods to consider, based on certain climate or geographical conditions, include hand digging when practical, soft digging, vacuum excavation methods, pneumatic hand tools. Other mechanical methods or other technical methods that may be developed may be used with the approval of the underground pipeline operator. Hand digging and non-invasive methods are not required for pavement removal.

Proposed new §18.11 establishes the reporting requirements. Subsection (a) requires each operator of an underground pipeline to report to the Commission all damage to its pipelines caused by an excavator within 10 days of the incident through Texas Damage Reporting Form (TDRF), the Commission's on-line reporting system. Subsection (b) requires each excavator that damages an underground pipeline to notify the operator through the notification center immediately following the damage incident, and, within 10 days, to submit an incident form to the Commission using TDRF. The TDRF will be available through the Railroad Commission Online System within a few months. Therefore, the proposed rule contains a reference to a form that will not be available for data entry until March 2007.

Subsection (c) requires each excavator that makes an additional call to the notification center because the excavator did not receive a positive response to report that fact to the Commission through TDRF. Subsection (d) encourages an emergency response official, a member of the general public, or another person aware of damage to an underground pipeline to submit an incident form.

Proposed new §18.12 sets forth penalty guidelines. Subsection (a) provides that the penalty amounts shown in the table in this section are provided solely as guidelines to be considered by the Commission in determining the amount of administrative penalties for violations of the requirements of this chapter. The establishment of these penalty guidelines in no way limits the Commission's authority and discretion to assess administrative penalties in any amount up to the statutory maximum when warranted by the facts in any case.

Subsection (b) states that the amount of any penalty requested, recommended, or finally assessed in an enforcement action will be determined on an individual case-by-case basis for each violation, taking into consideration the following factors: the person's history of previous violations, including the number of previous violations; the seriousness of the violation and of any pollution resulting from the violation; any hazard to the health or safety of the public; the degree of culpability; the demonstrated good faith of the person charged; and any other factor the Commission considers relevant.

Subsection (c) provides that the recommended monetary penalty for a violation may be reduced by up to 50% if the person charged agrees to a settlement before the Commission conducts an administrative hearing to prosecute a violation. Once the hearing is convened, the opportunity for the person charged to reduce the basic monetary penalty is no longer available. The reduction applies to the basic monetary penalty amount requested and not to any requested enhancements.

Subsection (d) states that, in determining the total amount of any monetary penalty requested, recommended, or finally assessed in an enforcement action, the Commission may consider, on an individual case-by-case basis for each violation, the demonstrated good faith of the person charged. Demonstrated good faith includes, but is not limited to, actions taken by the person charged before the filing of an enforcement action to remedy, in whole or in part, a violation of the rules in this chapter or to mitigate the consequences of a violation of the rules in this chapter.

Subsection (e) provides that, depending upon the nature of and the consequences resulting from a violation of this chapter, the Commission may impose a non-monetary penalty, such as requiring attendance at a safety training course, or may issue a warning. A warning is considered a violation of this chapter for purposes of this section.

Table 1 is a penalty guideline that incorporates a worksheet. Lines 1 through 16 of the table list specific conduct that is considered a violation of the rules in Chapter 18, shows the specific rule or rules governing the conduct, the recommended penalty, and leaves a space to insert the penalty recommended, if any. Line 17 is a subtotal line; line 18 is where any adjustment for settlement before hearing may be made; line 19 is another subtotal; and lines 20 through 25 are penalty enhancements which may be added if the violation had an adverse impact to a residential or public area, if the conduct of person charged was reckless, or if the person charged had previous violations. Line 26 is another subtotal line; line 27 is where any adjustment for the demonstrated good faith of the person charged may be made; and line 28 is the total recommended penalty.

Mary McDaniel, P.E., Director, Safety Division, has determined that for each of the first five years the proposed new rules will be in effect, there will be fiscal implications for state government. The Commission has identified at least two state agencies that will be affected by the proposed new rules. The initial costs for the Railroad Commission include additional personnel to administer the proposed new rules. Because it is not possible to predict the number of complaints and/or violations there may be of the "one call best practices" established in the proposed new rules, the staffing level is an estimate. However, based on prior years' data showing a minimum of 1,000 reports of pipeline damage and/or violations of safety rules, Ms. McDaniel estimates that the following additional staff will be needed to administer and enforce the proposed new rules: two field inspectors (Engineering Specialist I; Salary Group B09, starting at $40,000 per year) to receive complaints and conduct field investigations. The field investigations may require travel at an additional cost; one Engineering Specialist IV (Salary Group B12, starting at $55,000 per year) to perform technical review and processing; and one Administrative Assistant (Salary Group A13, starting $30,000 per year) to schedule enforcement hearings and handle correspondence. These are recurring annual costs.

Additionally, Ms. McDaniel anticipates that there will be additional assistance required from the Commission's Information Technology Division (ITS) to make changes and additions to the Pipeline Safety data collection process in order to track complaints, violations, and enforcement proceedings. ITS has estimated 1,199 total hours will be required to build a new database, create forms, queries, and reports, with a total projected one-time cost of $97,000.

Ms. McDaniel anticipates that in years two through five of the first five years that the proposed new rules will be in effect, there will be a reduction in the number of third-party damage incidents and a consequent reduction in the amount of field time necessary to investigate the incidents. In addition, if staff is able to be dedicated full-time to damage prevention issues, the field personnel will be able to focus on safety inspections for compliance with pipeline safety construction, operation, and maintenance requirements. The cost savings to the Railroad Commission would be reallocated into the field inspection program.

Ms. McDaniel anticipates that there will be costs to at least one other state governmental entity for complying with the proposed new rules. Specifically, Texas Department of Transportation (TXDOT) maintenance crews operate as "excavators" in the vicinity of pipelines and thus will be required to comply with the proposed new rules. Currently, TXDOT crews and others working in TXDOT rights of way are not required to provide notice of an excavation if it does not exceed a depth of 24 inches. The proposed new rules would require notice of an excavation that exceeds a depth of 16 inches. The Commission does not have data showing how many additional TXDOT excavations might be affected because of the notice requirements in the proposed new rules; however, any additional costs would most likely be incurred as a result of delaying the start of an excavation project until a pipeline's location has been marked or there has been an "all clear" positive response.

Ms. McDaniel has also determined that for each of the first five years the proposed amendments will be in effect, there will be fiscal implications for local governments. Local governments could experience additional costs in two ways. First, local governments, such as municipalities that own and operate natural gas distribution systems, would be required to mark their underground pipeline facilities in accordance with the marking requirements of the proposed new rules. Second, local governments, such as counties with maintenance crews that may excavate in the vicinity of underground pipelines, will be required to comply with the proposed new rules for excavation projects that exceed a depth of 16 inches. Currently, county maintenance crews and others working in TXDOT rights of way are not required to provide notice of excavation if excavating less than 24 inches. The Commission does not have data showing how many additional county maintenance excavation projects might be affected because of the notice requirements in the proposed new rules; however, any additional costs would most likely be incurred as a result of delaying the start of an excavation project until a pipeline's location has been marked or there has been an "all clear" positive response.

Ms. McDaniel further anticipates that for the first year of the first five years that the proposed new rules will be in effect, enforcement of the penalty provisions likely will result in an increase in revenue to state government as fines are assessed for instances of non-compliance. The proposed new rules would apply only to violations involving the movement of earth near pipelines, and because the state's One-Call Board is not currently assessing penalties for violations of its rules, it is likely that there will be violations of the Commission's rules as persons become familiar with the new requirements. However, it is not possible to estimate the amount of the revenue because it will be entirely dependent on the extent of compliance or non-compliance with the proposed new rules. Further, Ms. McDaniel anticipates that the revenue to the state derived from penalty payments will decrease as persons become familiar with the rules and violations therefore become fewer and/or less severe.

Ms. McDaniel has also determined that for each year of the first five years the proposed new rules will be in effect, the public benefit anticipated as a result of enforcing the new rules will be an improvement in safety due to a reduction of the number of damage to underground pipelines caused by third parties. Texas leads the nation in the number of incidents related to third party damages, and the proposed new rules are the first step in working to reduce the number of those incidents. By establishing standard requirements for white-lining proposed excavation sites, for making a positive response, for establishing a tolerance zone, and for line locate markings, and by providing a mechanism for enforcement of the rules, the Commission finds that the proposed

new rules should make a significant reduction in the number of incidents of damage to underground pipelines by third parties.

Texas Government Code, §2006.002 requires a state agency considering adoption of a rule that would have an adverse economic effect on small businesses or micro-businesses to reduce the effect if doing so is legal and feasible considering the purpose of the statutes under which the rule is to be adopted. Before adopting a rule that would have an adverse economic effect on small businesses, a state agency must prepare a statement of the effect of the rule on small businesses, which must include an analysis of the cost of compliance with the rule for small businesses and a comparison of that cost with the cost of compliance for the largest businesses affected by the rule, using cost for each employee, cost for each hour of labor, or cost for each $100 of sales.

Ms. McDaniel anticipates no adverse economic effect on small businesses, micro-businesses, or individuals, primarily because the proposed new rules are consistent with the current requirements, imposed under Texas Utilities Code, Chapter 251, that an excavator request the location of underground lines 48 hours prior to commencing excavation activities, and the Commission's proposed new rules do not change that requirement. In addition, the Commission has determined that because the purpose of the proposed new rules is to improve the safety of excavation activities in the vicinity of underground pipelines, it is not feasible to reduce any economic impact of the rules. Damage to underground pipelines is dangerous regardless of whether the excavator is a large corporation, small business, micro-business, or individual. The proposed new rules would, however, impose monetary penalties on persons that violate the rules; these are intended to deter non-compliance. Those economic consequences can be avoided by compliance with the rules.

Pursuant to Texas Government Code, §2001.022, the Commission has determined that the proposed new rules in Chapter 18 will not affect any local economy; therefore, no local employment impact statement is required.

Pursuant to Texas Government Code, §2001.0225, the Commission has determined that the proposed new rules in Chapter 18 are not major environmental rules and therefore no regulatory analysis under that section is required.

Comments on the proposal may be submitted to Rules Coordinator, Office of General Counsel, Railroad Commission of Texas, P.O. Box 12967, Austin, Texas 78711-2967; online at www.rrc.state.tx.us/rules/commentform.html; or by electronic mail to rulescoordinator@rrc.state.tx.us. The Commission will accept comments until 5:00 p.m., February 20, 2007, which is approximately 60 days after publication in the *Texas Register*. Comments should refer to GUD No. 9705. The Commission has determined that a 60-day comment period provides interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing, as required by Texas Government Code, §2001.029(a), because the Safety Division conducted three workshops on this rulemaking (March 23, May 23, and September 28, 2006) and made a draft of the rule proposal available as part of the third workshop. In addition, although the proposal will not be published in the *Texas Register* until Friday, December 22, 2006, the event that initiates the formal comment period, the text of this rule proposal, including the preamble, will be posted on the Commission's web site beginning Wednesday, December 6, 2006. The Commission gives notice that one result of this rulemaking may be the exemption of additional entities and/or activities from the new rules in Chapter 18; therefore, the Commission specifically requests comments regarding exemptions. Comments may propose that additional exemptions be granted, or may urge that no additional exemptions are granted or that exemptions currently provided are removed. The Commission encourages all interested persons to submit comments no later than the deadline. The Commission cannot guarantee that comments submitted after the deadline will be considered. For further information, call Mary McDaniel at (512) 463-7166. The status of Commission rulemakings in progress is available at http://www.rrc.state.tx.us/rules/proposed.html.

The Commission proposes the new sections pursuant to Texas Natural Resources Code, §117.012, and Texas Utilities Code, §121.201 (as amended by House Bill 2161, Acts 2005, 79th Leg., R.S., ch. 267, §§6 and 13, eff. Sept. 1, 2005). As amended, Texas Natural Resources Code, §117.012, provides that the Commission shall adopt rules that include safety standards for and practices applicable to the intrastate transportation of hazardous liquids or carbon dioxide by pipeline and intrastate hazardous liquid or carbon dioxide pipeline facilities, including safety standards related to the prevention of damage to such a facility resulting from the movement of earth by a person in the vicinity of the facility, other than movement by tillage that does not exceed a depth of 16 inches. As amended, Texas Utilities Code, §121.201(a)(1), states that the Commission may by rule prescribe or adopt safety standards for the transportation of gas and for gas pipeline facilities, including safety standards related to the prevention of damage to such a facility resulting from the movement of earth by a person in the vicinity of the facility, other than movement by tillage that does not exceed a depth of 16 inches. In addition, by proposing the new rules in Chapter 18, the Commission is implementing the authority delegated by and under Texas Health and Safety Code, §756.106 (as added by Senate Bill 9, Acts 2005, 79th Leg., R. S., ch. 1337, §19, and editorially renumbered as Health and Safety Code, §756.126). This new provision states that the Commission shall adopt and enforce safety standards and best practices, including those described by 49 U.S.C. Section 6105 et seq., relating to the prevention of damage by a person to a facility under the jurisdiction of the Commission. With some stated exceptions, the proposed new rules would apply to all persons engaged in or preparing to engage in the movement of earth in the vicinity of an intrastate underground pipeline containing flammable, toxic, or corrosive gas, a hazardous liquid, or carbon dioxide.

Texas Natural Resources Code, §117.012; Texas Utilities Code, §121.201; and Texas Health and Safety Code, §756.126 are affected by the proposed new rules.

Statutory authority: Texas Natural Resources Code, §117.012; Texas Utilities Code, §121.201; and Texas Health and Safety Code, §756.126.

Cross-reference to statute: Texas Natural Resources Code, §117.012; Texas Utilities Code, §121.201; and Texas Health and Safety Code, §756.126.

Issued in Austin, Texas, on December 5, 2006.

§18.1. Scope, Applicability, and General Provisions.

(a) This chapter implements the authority of the Railroad Commission of Texas (Commission) under Texas Natural Resources Code, §117.012, and Texas Utilities Code, §121.201 (as amended by House Bill 2161, Acts 2005, 79th Leg., R.S., ch. 267, §§6 and 13, eff. Sept. 1, 2005), and under Texas Health and Safety Code, §756.106 (as added by Senate Bill 9, Acts 2005, 79th Leg., R. S., ch. 1337, §19, and editorially renumbered as Health and Safety Code, §756.126). Except

as provided in subsection (d) of this section, this chapter applies to all persons engaged in or preparing to engage in the movement of earth in the vicinity of an intrastate underground pipeline containing flammable, toxic, or corrosive gas, a hazardous liquid, or carbon dioxide.

(b) The requirements of this chapter are based on the presumption that an excavator will notify a notification center pursuant to, and that a pipeline operator will respond in accordance with, the provisions of Texas Utilities Code, Chapter 251, and the requirements of the notification center. However, compliance with the provisions of Texas Utilities Code, Chapter 251, and the requirements of a notification center does not necessarily constitute compliance with the requirements of this chapter.

(c) Persons that are exempt from the provisions of Texas Utilities Code, Chapter 251, may be required to comply with this chapter.

(d) This chapter does not apply to:

(1) the exemptions in Texas Utilities Code, §251.003;

(2) the movement of earth that does not exceed a depth of 16 inches; or

(3) surface mining operations.

(e) This chapter applies to movement of earth by tillage that exceeds a depth of 16 inches.

(f) Unless otherwise specified, all time periods used in this chapter shall be calculated from the time the original notification is given to the notification center.

(g) Unless otherwise specified, all time periods are stated in working days.

(h) Unless an excavator and an operator otherwise expressly agree in accordance with the requirements set forth in §18.3 of this title, relating to Excavator Notice to Notification Center, the life of a line locate ticket shall be 14 days.

(i) Unless otherwise expressly stated in this chapter, each excavator and each operator shall retain required records for at least four years. All records made pursuant to this chapter are subject to inspection by the Commission for compliance with this chapter.

§18.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) Damage--Includes but is not limited to:

(A) defacing, scraping, displacement, penetration, destruction, or partial or complete severance of an underground pipeline or of any protective coating, housing, or other protective device of an underground pipeline;

(B) weakening of structural or lateral support of an underground pipeline that affects the integrity of the pipeline; or

(C) failure to properly replace the backfill surrounding an underground pipeline.

(2) Demolish or demolition--Any operation by which a structure or mass of material is wrecked, razed, rendered, moved, or removed by means of any tools, equipment, or discharge of explosives.

(3) Emergency--A sudden or unexpected occurrence involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.

(4) Excavate--Movement of earth by any means.

(5) Excavator--A person that engages in or is preparing to engage in the movement of earth.

(6) Hand digging--Any movement of earth using non-mechanized tools or equipment, soft digging, or vacuum excavation. Hand digging includes but is not limited to digging with shovels, picks, and manual post hole diggers.

(7) Legal holiday--A holiday specified as a legal holiday by Subchapter B, Chapter 662, Texas Government Code.

(8) Locate or marking--An operator's or its contract locator's physical demarcation of the location of an underground pipeline.

(9) Locate ticket, line locate ticket, or ticket--The record of the notice of intent to excavate given by an excavator to a notification center in conformance with Texas Utilities Code, §§251.151 and 251.152.

(10) Locator--A person charged with determining and marking the approximate horizontal location of underground pipeline that may exist within an area either specified by a notice served on a notification center or designated by white-lining.

(11) Movement of earth--Any operation in which earth, rock, or other material in the ground, any structure, or any mass of material is moved, removed, disturbed, or otherwise displaced by hand digging, mechanized equipment or tools of any kind, or explosives, and includes but is not limited to augering, backfilling, boring, cable or pipe plowing and driving, compressing, cutting, demolition, digging, ditching, dragging, dredging, drilling, grading, plowing-in, pulling-in, razing, rendering, ripping, scraping, tilling of earth at a depth exceeding 16 inches, trenching, tunneling, or wrecking.

(12) Mechanized equipment or tool--A piece of equipment or a tool operated by mechanical power, including but not limited to a tractor, trencher, bulldozer, power shovel, auger, backhoe, scraper, drill, cable or pipe plow and/or driver, and other equipment used to plow in or pull in cable or pipe.

(13) Notification center--A legal entity established and operated pursuant to Texas Utilities Code, Chapter 251.

(14) Notify, notice, or notification--The completed delivery of information to the person to be notified, and the receipt of that information by that person in accordance with this chapter. The delivery of information includes but is not limited to the use of any electronic or technological means of data transfer.

(15) Operator--A person who operates on his or her own behalf, or as an agent designated by the owner, a pipeline containing flammable, toxic, or corrosive gas, a hazardous liquid, or carbon dioxide.

(16) Person--Any individual, operator, firm, joint venture, partnership, corporation, association, municipality, or other political subdivision, governmental unit, department or agency, and includes any trustee, receiver, assignee, or personal representative thereof.

(17) Positive response--Notification, markings left at an excavation site, or other shared or transmitted information that allows an excavator to know prior to the beginning of excavation that underground pipelines have been located and marked or that there are no underground pipelines in the vicinity of the planned excavation.

(18) Soft digging--Any movement of earth using tools or equipment that use air or water pressure as the direct means to break up soil or earth for removal by vacuum excavation.

(19) Spot marking--Making a circle around the spot where excavation is to take place, typically used when standard marking tech-

niques would be considered damaging to property or cannot be used because of limited space.

(20) Tillage--The manipulation of soil into a desired condition in preparation for planting and the cultivation by loosening or breaking up of soil around growing plants by hand digging or by use of a moldboard, disk, rotary, chisel or subsoil plow, a cultivator, a harrow, or a tiller.

(21) Tolerance zone--Half the width of the underground pipeline plus a minimum of 18 inches on either side of the outside edge of the underground pipeline on a horizontal plane.

(22) TDRF--The Texas Damage Reporting Form, the on-line reporting system of the Railroad Commission for use in reporting damage to underground pipelines or violations of this chapter.

(23) Underground pipeline--A pipeline containing flammable, toxic, or corrosive gas, a hazardous liquid, or carbon dioxide that is located partially or totally underground.

(24) White-lining--An excavator's designation on the ground of the area to be excavated using white paint, white flags, white stakes, or any combination of these.

(25) Working day--Every day that is not a Saturday, a Sunday, or a legal holiday.

§18.3. Excavator Notice to Notification Center.

(a) An excavator shall request the location of underground pipelines at each planned excavation site by giving notice to the notification center as required by Texas Utilities Code, Chapter 251.

(b) An excavator shall include in the notice the method or methods by which the excavator will receive a positive response.

(c) When an excavation site cannot be clearly identified and described on a line locate ticket, the excavator shall use white-lining to mark the excavation area prior to giving notice to the notification center and before the locator arrives on the excavation site.

(d) If an excavation project is too large to mark using white-lining or is so expansive that a full description cannot be provided on a line locate ticket, then the operator and the excavator shall conduct a face-to-face meeting to discuss the planned excavation activities and to establish protocols for:

(1) the interval between each notice to the notification center;

(2) the scope of each line locate ticket; and

(3) the life of each line locate ticket.

(e) If an excavation project is not completed at the time a line locate ticket expires, the excavator shall refresh the ticket by giving the notice described in subsection (a) of this section. A request to refresh may be limited to the area yet to be excavated.

(f) An excavator and an operator may agree that the life of a line locate ticket is more than 14 days provided that:

(1) the agreement is in writing; and

(2) the agreement is signed and dated by both the excavator and the operator.

(g) Both the excavator and the operator shall retain a copy of any agreement made pursuant to subsection (f) of this section.

§18.4. Excavator Obligation to Avoid Damage to Underground Pipelines.

(a) An excavator shall comply with the requirements of §18.3 of this title, relating to Excavator Notice to Notification Center. An excavator shall also comply with the requirements of Texas Health & Safety Code, Subchapter H, relating to Construction Affecting Pipeline Easements and Rights-of-Way, and shall plan an excavation in such a manner as to avoid damage to and minimize interference with all underground pipelines in the vicinity of the excavation area and shall take all reasonable steps to protect underground pipelines from damage.

(b) An excavator shall wait the time required by Texas Utilities Code, Chapter 251, before beginning excavation.

(c) Prior to excavation, an excavator shall confirm that a copy of a valid locate ticket for the location is in the possession of the excavator's designated representative and can be obtained from the representative or can be provided within one hour of a request from the operator or the Commission.

(d) Prior to excavation, an excavator shall verify that it is at the correct location as specified on the locate ticket; shall verify white-lining; and, to the best of the excavator's ability, shall check for any unmarked underground pipelines. Checking for unmarked underground pipelines includes, for example, looking for additional pipeline line markers, aboveground pipeline valves, and regulator stations.

(e) An excavator shall not begin excavating until a second notice is given to the notification center for the area if:

(1) the excavator has knowledge of the existence of an underground pipeline and has received an "all clear" or a "no conflict" response from an operator;

(2) the excavator observes clear evidence (such as a line marker or an above-ground fixture) of the presence of an unmarked underground pipeline in the area of the proposed excavation, and has received an "all clear" or a "no conflict" response from an operator;

(3) there is no positive response for the excavation area; or

(4) the positive response is unclear or obviously erroneous (for example, for a different location or for a different type of underground facility).

(f) If an excavator has given a second notice in accordance with §18.3 of this title, relating to Excavator Notice to Notification Center, and there is no positive response within four hours, the excavator may begin excavating.

(g) An excavator shall protect and preserve locate markings from the time the excavator begins work until markings are no longer required for the proper and safe excavation in the vicinity of all underground pipelines.

§18.5. Operator and Excavator Obligations with Respect to Positive Response.

(a) Upon being contacted by the notification system, an operator shall provide a positive response within the time frames specified in Texas Utilities Code, Chapter 251, by either:

(1) marking the operator's underground pipelines in accordance with the requirements of Texas Utilities Code, Chapter 251, and this chapter; or

(2) notifying the excavator that the operator has no underground pipelines in the vicinity of the proposed excavation area. The operator shall provide this "all clear" or "no conflict" notice using the method or methods that the excavator specified in accordance with §18.3 of this title, relating to Excavator Notice to Notification Center.

(b) Both the excavator and the operator shall make a record of the positive response regarding each line locate ticket received.

(c) An excavator that gives a second notice to the notification center pursuant to §18.4(e) of this title, relating to Excavator Obligation

to Avoid Damage to Underground Pipelines, because an operator failed to provide a positive response to an excavator shall report that fact to the Commission through TDRF as set forth in §18.11 of this title, relating to Reporting Requirements.

§18.6. General Marking Requirements.

(a) At a minimum, all markings shall conform to the requirements of American Public Works Association (APWA) Uniform Color Code (ANSI Standard Z535.1, Safety Color Code).

(b) Markings shall be valid for an excavation site for 14 days from the time a positive response is given, unless the markings were placed in response to an emergency and the emergency condition has ceased to exist. If a line locate ticket has been refreshed pursuant to §18.3(e) of this title, relating to Excavator Notice to Notification Center, then the operator shall either ensure that markings are still valid or shall re-mark.

(c) If the use of line marking is considered damaging to property (driveways, landscaping, historic locations to the extent boundaries are known), a locator shall use spot marking or another suitable marking method or methods.

§18.7. Excavator Marking Requirements.

(a) Prior to giving notice pursuant to §18.3 of this title, relating to Excavator Notice to Notification Center, an excavator shall mark the specific excavation area using white paint (if applicable), flags, or stakes, whichever is most visible for the terrain.

(b) An excavator shall mark the area of excavation using intervals that show the direction of the excavation.

§18.8. Operator Marking Requirements.

(a) A locator shall use all information necessary to mark underground pipelines accurately.

(b) Locators shall mark the approximate center line of an underground pipeline.

(c) If, in the process of marking an underground pipeline, a locator discovers a customer-owned underground pipeline, the locator shall make a reasonable effort to advise the excavator of the presence of the customer-owned underground pipeline.

(d) Where a proposed excavation crosses an underground pipeline, markings shall be at intervals that clearly define the route of the underground pipeline, to the extent possible.

(e) A locator shall mark underground pipelines by means of stakes, paint, flags, or a combination of two or more of these. The terrain, site conditions, and type and extent of the proposed excavation shall be considered in determining the most suitable means for marking underground pipelines.

(f) A locator shall mark at sufficient intervals to indicate clearly the approximate horizontal location and direction of the underground pipeline or pipelines. The distance between any two marks indicating the same line shall not exceed 20 feet; however, a shorter distance between marks may be necessary because of site conditions or directional changes of the underground pipeline.

(g) Markings of an underground pipeline greater than six inches in nominal outside dimension shall include the size in inches at every other mark.

(h) A locator shall extend all markings, if practical, at least one additional mark beyond the boundaries of the specific location of the proposed work as detailed on the line locate ticket.

(i) A locator shall make paint marks approximately eight to ten inches in length and one to two inches in width except when spot marking is necessary. A locator shall make a minimum of three separate marks for each underground pipeline marking.

§18.9. Options for Managing an Excavation Site in the Vicinity of an Underground Pipeline.

(a) After complying with the notice requirements of §18.3 of this title, relating to Excavator Notice to Notification Center, an excavator and an operator may jointly establish the protocols applicable to an excavation site in the vicinity of underground pipelines based on the particular characteristics of each job. The protocols applicable to an excavation site may:

(1) designate the contact person or persons for each entity working at an excavation site;

(2) establish the required mode or modes of communication among all entities working at an excavation site, e.g., telephone or other electronic means or face-to-face meetings at prescribed times or intervals;

(3) provide the method for coordinating work activities among all entities working at an excavation site;

(4) provide for the ownership and/or possession of the locate ticket or tickets;

(5) declare which entity or entities must have the locate ticket or locate ticket number before beginning work;

(6) state the life of a locate ticket and the circumstances that require refreshing the locate ticket;

(7) designate the extent of the tolerance zone, provided that it shall not be less than 24 inches, and the type of excavation permitted within the tolerance zone; and

(8) provide for any other agreement with respect to excavation activities and/or marking requirements that will or will tend to ensure the proper and safe excavation in the vicinity of an underground pipeline.

(b) If an excavator and an operator jointly establish protocols pursuant to this section, both the excavator and the operator shall make and retain a record of the agreement.

§18.10. Excavation within Tolerance Zone.

(a) An excavator shall comply with the requirements of Texas Health & Safety Code, Subchapter H, relating to Construction Affecting Pipeline Easements and Rights-of-Way.

(b) When excavation is to take place within the specified tolerance zone, an excavator shall exercise such reasonable care as may be necessary for the protection of any underground pipeline in or near the excavation area. Methods to consider, based on certain climate or geographical conditions, include hand digging when practical, soft digging, vacuum excavation methods, pneumatic hand tools. Other mechanical methods or other technical methods that may be developed may be used with the approval of the underground pipeline operator. Hand digging and non-invasive methods are not required for pavement removal.

§18.11. Reporting Requirements.

(a) Each operator of an underground pipeline shall report to the Commission all damage to its pipelines caused by an excavator. An operator shall submit the information to the Commission within 10 days of the incident through TDRF, which may be accessed at *webapps.rrc.state.tx.us* using its assigned operator identification code.

(b) Each excavator that damages an underground pipeline shall notify the operator immediately following the damage incident through the notification center, and shall submit an incident

form to the Commission using TDRF, which may be accessed at *webapps.rrc.state.tx.us*, and the excavator sign-in. An excavator shall submit the damage report to the Commission within 10 days of the incident.

(c) Each excavator that makes an additional call to the notification center pursuant to §18.4(e) of this title, relating to Excavator Obligation to Avoid Damage to Underground Pipelines, because the excavator did not receive a positive response, shall report that fact to the Commission through TDRF.

(d) An emergency response official, a member of the general public, or another person aware of damage to an underground pipeline is encouraged to submit an incident form using TDRF, which can be accessed at *webapps.rrc.state.tx.us*. Entries can be made through the general public or emergency response official sign-in.

§18.12. Penalty Guidelines.

(a) The penalty amounts shown in Table 1 of this section are provided solely as guidelines to be considered by the Commission in determining the amount of administrative penalties for violations of the requirements of this chapter. The establishment of these penalty guidelines shall in no way limit the Commission's authority and discretion to assess administrative penalties in any amount up to the statutory maximum when warranted by the facts in any case.
Figure: 16 TAC §18.12(a)

(b) The amount of any penalty requested, recommended, or finally assessed in an enforcement action will be determined on an individual case-by-case basis for each violation, taking into consideration the following factors:

(1) the person's history of previous violations, including the number of previous violations;

(2) the seriousness of the violation and of any pollution resulting from the violation;

(3) any hazard to the health or safety of the public;

(4) the degree of culpability;

(5) the demonstrated good faith of the person charged; and

(6) any other factor the Commission considers relevant.

(c) The recommended monetary penalty for a violation may be reduced by up to 50% if the person charged agrees to a settlement before the Commission conducts an administrative hearing to prosecute a violation. Once the hearing is convened, the opportunity for the person charged to reduce the basic monetary penalty is no longer available. The reduction applies to the basic monetary penalty amount requested and not to any requested enhancements.

(d) In determining the total amount of any monetary penalty requested, recommended, or finally assessed in an enforcement action, the Commission may consider, on an individual case-by-case basis for each violation, the demonstrated good faith of the person charged. Demonstrated good faith includes, but is not limited to, actions taken by the person charged before the filing of an enforcement action to remedy, in whole or in part, a violation of the rules in this chapter or to mitigate the consequences of a violation of the rules in this chapter.

(e) Depending upon the nature of and the consequences resulting from a violation of this chapter, the Commission may impose a non-monetary penalty, such as requiring attendance at a safety training course, or may issue a warning. A warning shall be considered a violation of this chapter for purposes of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606523
Mary Ross McDonald
Managing Director
Railroad Commission of Texas
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 475-1295

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 1. AGENCY ADMINISTRATION
SUBCHAPTER A. GENERAL PROVISIONS

19 TAC §1.17

The Texas Higher Education Coordinating Board proposes new §1.17, concerning Agency Administration. Specifically, this new section will authorize the Commissioner to provide direct supervision of the educational research centers created by Texas Education Code, §1.005.

Ms. Susan Brown, Assistant Commissioner for Planning and Accountability, has determined that, for each year of the first five years the section is in effect, there will not be any fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Brown, Assistant Commissioner for Planning and Accountability, has also determined that, for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be the efficient operation of newly created or established educational research center. There is no effect on small businesses. There is no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Gary Johnstone, Deputy Assistant Commissioner, Planning and Accountability, P.O. Box 12788, Austin, TX, 78711; gary.johnstone@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The new section is proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules.

The new section affects Texas Education Code, §1.005.

§1.17. Authority of the Commissioner to Provide Direct Supervision of the Educational Research Centers.

The Board authorizes the Commissioner to provide direct supervision of the educational research centers created by Texas Education Code §1.005.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 11, 2006.

TRD-200606595
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: January 25, 2007
For further information, please call: (512) 427-6114

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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 97. PLANNING AND ACCOUNTABILITY

SUBCHAPTER AA. ACCOUNTABILITY AND PERFORMANCE MONITORING

19 TAC §97.1002

The Texas Education Agency (TEA) proposes new §97.1002, concerning the identification of technical assistance team campuses. The proposed new section would implement the requirements of the Texas Education Code (TEC), §39.1322, as added by House Bill (HB) 1, 79th Texas Legislature, Third Called Session, 2006. In accordance with statute, the proposed new rule would describe the procedures for the annual assignment of technical assistance teams to certain campuses rated Academically Acceptable.

HB 1, amended the TEC, Chapter 39, by adding §39.1322 requiring the commissioner of education to select and assign a technical assistance team (TAT) to a campus rated Academically Acceptable in the state accountability rating system if that campus would be rated Academically Unacceptable using the accountability standards for the subsequent year.

Proposed new 19 TAC §97.1002 would establish provisions for identifying TAT campuses, including waiving the requirement to assign a TAT based on specific criteria.

Criss Cloudt, Associate Commissioner for Accountability and Data Quality, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section relating to identification of TAT campuses.

Dr. Cloudt has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section relating to identification of TAT campuses will be the early identification of campuses that are at risk of not meeting higher state accountability standards required in the subsequent school year. There will be no effect on small businesses. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

The public comment period on the proposal begins December 22, 2006, and ends January 21, 2007. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed new section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The new section is proposed under the TEC, §39.1322, which requires the commissioner of education to select and assign a technical assistance team to assist a campus in executing a school improvement plan, and any other school improvement strategies the commissioner determines appropriate, for a campus that is rated academically acceptable for the current school year but would be rated as academically unacceptable if performance standards to be used for the following school year were applied to the current school year.

The new section implements the TEC, §39.1322.

§97.1002. Identification of Technical Assistance Team Campuses.

(a) The commissioner of education will annually assign a technical assistance team to a campus rated Academically Acceptable in the state accountability rating system if that campus would be rated Academically Unacceptable using the accountability standards for the subsequent year.

(1) The current year campus performance will be evaluated against the accountability standards that have been established for the subsequent school year for each base indicator of the state accountability system.

(2) All students and each student group evaluated in the state accountability system that meets minimum size requirements in the current school year must meet the standards established for the subsequent school year.

(3) A technical assistance team shall be assigned to a campus evaluated under either standard or alternative education accountability procedures.

(4) The commissioner shall annually identify campuses assigned technical assistance teams following the resolution of appeals related to the state accountability ratings, as defined in the Texas Education Code, §39.301.

(b) The commissioner may waive the requirement to assign a technical assistance team.

(1) A campus with improvement gains over the preceding three years that are greater than or equal to the improvement needed to achieve the standards established for the subsequent school year is eligible for the waiver.

(2) The methodology used to determine sufficient improvement gains will be based on the average gain in performance over the preceding three years compared to the improvement needed to achieve each standard established for the subsequent school year. The improvement needed is the difference between the standard established for the subsequent school year and actual performance in the current school year.

(3) A campus must be evaluated under the same accountability procedures, either standard or alternative education accountability, in each of the preceding three years in order to be eligible for the waiver.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 11, 2006.

TRD-200606597
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 6. TEXAS BOARD OF PROFESSIONAL ENGINEERS

CHAPTER 131. ORGANIZATION AND ADMINISTRATION

SUBCHAPTER A. ORGANIZATION OF THE BOARD

22 TAC §131.15

The Texas Board of Professional Engineers proposes an amendment to §131.15, relating to Committees. The proposed amendment alters the frequency of meetings of the Legislative Committee of the Board.

The proposed rule amendment changes the meeting frequency of the Legislative Committee of the Board from twice per year to an as-needed basis.

Lance Kinney, P.E., Deputy Executive Director for the board, has determined that, for the first five-year period the proposed amendment is in effect, there are no fiscal implications for the state or local government as a result of enforcing or administering the section as amended. Mr. Kinney has determined that there is no additional cost to the agency or to licensees. There is no fiscal impact to individuals required to comply with the rule. There is no effect to small or micro businesses.

Mr. Kinney also has determined that, for the first five years the proposed amendment is in effect, the public benefit anticipated as a result of enforcing the proposed amendment would be an effective use of Board resources while still meeting the legislative and regulatory requirements of Board committees.

Comments may be submitted no later than 30 days after the publication of this notice to Lance Kinney, P.E., Deputy Executive Director, Texas Board of Professional Engineers, 1917 IH-35 South, Austin, Texas 78741 or faxed to his attention at (512) 440-0417.

The amendment is proposed pursuant to the Texas Engineering Practice Act, Occupations Code §1001.202, which authorizes the board to make and enforce all rules and regulations and bylaws consistent with the Act as necessary for the performance of its duties, the governance of its own proceedings, and the regulation of the practice of engineering in this state.

No other statutes, articles or codes are affected by the proposed amendment.

§131.15. Committees.

(a) The board chair shall appoint the following standing committees as stated in paragraphs (1) - (5) of this subsection, composed of four board members at least one of whom is a public member. A committee quorum shall consist of three members. Committee appointments shall be made by the chair for a term of two years but may be terminated at any point by the chair. Committee members may be re-appointed at the discretion of the chair. The board chair shall appoint a committee chair.

(1) - (4) (No change.)

(5) Legislative Issues Committee. The committee shall meet as needed [~~at least twice a year~~] to consider legislative matters that may affect the practice of engineering in the state. Pursuant to the Chapter 556, Texas Government Code, the committee shall not lobby or strive to influence legislation regarding the practice of engineering but meet to consider board responses to pending legislation and assist in answering related inquiries from the Texas Legislature, Governor or other state agency or governmental entity during the legislative session. The committee shall report to the full board on actions and activities addressed on behalf of the board.

(b) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 11, 2006.

TRD-200606591
Dale Beebe Farrow, P.E.
Executive Director
Texas Board of Professional Engineers
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 440-7723

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PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 535. GENERAL PROVISIONS

SUBCHAPTER R. REAL ESTATE INSPECTORS

22 TAC §535.223

The Texas Real Estate Commission (TREC) proposes an amendment to §535.223, concerning standard inspection report forms. The amendment would delete a provision that exempts home inspectors from the requirement to use the promulgated Inspection Report Form for inspections for which a relocation company or a seller's employers requires use of a different form. Thus licensed home inspectors would be required to use the Inspection Report for such inspections.

The proposed amendment was recommended by the Texas Real Estate Inspector Committee, an advisory committee of nine professional inspectors appointed by TREC.

Loretta R. DeHay, general counsel, has determined that for the first five-year period the section is in effect there will be no fiscal implications for the state as a result of enforcing or administering the sections. There are no anticipated fiscal implications for units of local government. There is no anticipated impact on small businesses, micro businesses or local or state employment as a result of implementing the sections.

Ms. DeHay also has determined that for each year of the first five years the sections as proposed are in effect the public benefit an-

ticipated as a result of enforcing the sections will be consistency in the manner in which inspections are reported to buyers and sellers of real estate. There is no anticipated economic cost to persons who are required to comply with the proposed amendment.

Comments on the proposal may be submitted to Loretta R. DeHay, General Counsel, Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188.

The amendment is proposed under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to make and enforce all rules and regulations necessary for the performance of its duties and to establish standards of conduct and ethics for its licensees in keeping with the purpose and intent of the Act to insure compliance with the provisions of the Act.

The statutes affected by this proposal are Texas Occupations Code, Chapters 1101 and 1102. No other statute, code or article is affected by the proposed amendment.

§535.223. Standard Inspection Report Form.

(a) - (f) (No change.)

(g) This section does not apply to the following:

(1) inspections of remodeling or re-inspections; or

(2) inspections for which federal or state law requires use of a different report. [~~; or~~]

[~~(3) inspections for which a relocation company or a seller's employer requires use of a different report, and the first page of the report contains a notice either in bold or underlined print reading substantially similar to the following: "This report was prepared for a relocation company or seller's employer in accordance with the company's requirements. The report is not intended as a substitute for an inspection of the property by an inspector of the buyer's choice. Standard inspection reports required by the Texas Real Estate Commission may contain additional information a buyer should consider in making a decision to purchase." If the report form required by the relocation company or seller's employer does not contain the notice, the inspector may attach the notice to the first page of the report at the time the report is prepared by the inspector. If the inspector attaches the notice, the inspector is not required to use a form adopted by the commission to report the inspection.~~]

(h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 7, 2006.

TRD-200606550
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 465-3900

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 57. FISHERIES

SUBCHAPTER A. HARMFUL OR POTENTIALLY HARMFUL FISH, SHELLFISH, AND AQUATIC PLANTS

31 TAC §57.111, §57.113

The Texas Parks and Wildlife Department proposes amendments to §57.111 and §57.113, concerning Harmful or Potentially Harmful Exotic Fish, Shellfish and Aquatic Plants. The proposed amendments were previously published in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5762). As previously proposed, one impact of the rules would have been to prohibit the possession, transportation, and sale of all species of crayfish in the family Parastacidae. In the notice of proposed rulemaking, the department stated that there would be no fiscal impact to small and microbusinesses. At that time, however, the department was unaware that there were at least three persons in the state engaged in the propagation and sale of live Australian redclaw crayfish, which are in the Parastacidae family. The department therefore has withdrawn the proposed amendments to §57.111 and §57.113 and reproposes them here with a new small and microbusiness impact statement.

The proposed amendment to §57.111, concerning Definitions, is necessary to standardize terminology and add several families, genera, and species to the definition of harmful or potentially harmful exotic fish, shellfish and aquatic plants in order to better protect native aquatic resources and to be consistent with United States Department of Agriculture and Texas Department of Agriculture regulations. The proposed amendment to §57.113, concerning Exceptions, would replace terminology as necessary to be consistent with the proposed amendments to §57.111, concerning Definitions, and clarify the conditions under which exotic fish or shellfish may be possessed without a permit. The current rule specifies that exotic fish and shellfish may be possessed without a permit if 'the intestines have been removed.' The amendment would replace that phrase with the phrase 'gutted or beheaded.' The intent of the current rule is to prevent live exotic fish and shellfish from being released into native ecosystems. By using the term 'gutted' the department hopes to provide a more precise description of the condition that must exist in order for the exception to apply and provides for beheading in addition to evisceration as an acceptable practice for ensuring non-viability. The proposed amendment also would allow the sale and transport of live Parastacidae to restaurants for on-premises consumption, and would allow the transport of live Parastacidae outside Texas.

The adverse effects of intentional and accidental introductions of exotic aquatic species into natural aquatic systems have been widely studied and documented around the world. The impact of a specific exotic species on a given native ecosystem is difficult to predict, but in general terms, the threat potential can be characterized by 1) evidence that the species is invasive elsewhere, 2) potential suitable range, 3) reproductive potential, 4) habitat quality, 5) the presence/absence of similar species, 6) the prey/predator relationship within the prospective habitat, and 7) food abundance. In addition, other factors, such as dispersal dynamics, can affect the efficacy of establishment. Once estab-

lished, invasive exotic species are extremely difficult if not impossible to eliminate.

Based on empirical scientific evidence and the widely acknowledged threat that exotic species pose to native species and ecosystems, the department believes that the regulation of those fish, shellfish, and aquatic plants that pose demonstrable, potential, or unknown threats to native populations is an integral component of maintaining and protecting existing aquatic ecosystems. The species subject to restrictions by these rules have been selected because the department believes they are or could be threats to native ecosystems in Texas.

The proposed amendment to §57.111, concerning Definitions, would alter the definition of "fish farmer" by including the term "aquaculturist," replace the term "fish farm" with the term "aquaculture facility" and replace the term "fish farm complex" with the term "aquaculture complex". The amendment is necessary to clarify that the subchapter applies to persons who culture or possess harmful or potentially harmful exotic aquatic plants as well as animals. The amendment also defines the terms 'gutted' and 'beheaded' to ensure unambiguous meanings of those terms for the purposes of enforcing the provisions of the subchapter that set forth the conditions under which exotic fish may be possessed or transported.

The proposed amendment also updates the rules to include changes in scientific nomenclature and the reclassification of certain species, corrects errors, and makes nonsubstantive changes in the interest of clarification and consistency, including the redesignation of elements of the rule's structure where necessary.

The proposed amendment to current §57.111(14)(E) would clarify that the provisions of the subchapter affect only the genus Hydrocynus and add the correct subfamily name. The proposed amendment is necessary to make the provisions of the subchapter taxonomically accurate.

The proposed amendment to current §57.111(14)(F) would correct a misspelling (Pirambebas) and exclude the genus Piaractus from the provisions of the subchapter. The proposed amendment is necessary to maintain accurate taxonomic references and to exempt a genus that is fairly popular in the pet trade and not deemed to be an ecological threat to native ecosystems.

The proposed amendment to current §57.111(14)(G) would add the family name and common name for tetras affected by the subchapter in order to provide clarity and maintain parallelism with the identification convention employed throughout the subchapter.

The proposed amendment to current §57.111(14)(H) would add the family name for affected dourados in order to provide clarity.

The proposed amendment to current §57.111(14)(J) would revise the taxonomic references in the paragraph to conform with those prescribed by the American Fisheries Society. The proposed amendment is necessary to ensure accurate taxonomic references.

The proposed amendment to current §57.111(14)(M) would add the common names of affected carps and minnows, and add two new genera (Labeo and Catlocarpio) to the list of prohibited carps and minnows, in addition to making changes to reflect reclassifications, corrections and clarifications. Carp in the genera Labeo and Catlocarpio are nearly identical to those in two already-prohibited genera, Cirrhinus and Catla, respectively. Generally, exotic carp have caused a wide array of ecological problems in Texas and elsewhere and it is reasonable to assume that the genera Labeo and Catlocarpio have the potential to cause similar problems. These genera were not restricted previously because there did not appear to be an importation threat. However, small specimens of Catlocarpio are beginning to become available in the international pet trade, including over the internet. Catlocarpio are large Asian carp that reach sizes of eight feet or more. Aquarium fish that rapidly grow very large are prime candidates for illegal releases in local waters. Therefore, it is prudent to restrict these genera now before major trade markets have developed as opposed to attempting to eliminate them after they have become established in food markets or the pet trade.

The proposed amendment to current §57.111(14)(S) would adjust taxonomic references as necessary to reflect reclassification within the Tilapia family by the scientific community.

The proposed amendment to current §57.111(14)(V) would adjust taxonomic references as necessary to reflect reclassification within the Percidae family by the scientific community.

The proposed amendment to current §57.111(14)(W) would add taxonomic language to address differences of opinion within the scientific community regarding the family name of Nile perch.

The proposed amendment to current §57.111(14)(X) would correct the common names of the species affected by the subparagraph. The proposed amendment is necessary to improve clarity.

The proposed amendment to current §57.111(14)(Z) would correct a misspelling (Ruffe). The proposed amendment is necessary to maintain accurate taxonomic references.

The proposed amendment to §57.111(14)(DD), would correct an error by moving Heteropneustidae to subparagraph (AA), because Heteropneustidae is the scientific name for the air sac catfishes family and should not be listed under the goby family. The proposed amendment also adds a single genus of the goby family to the definition of harmful or potentially harmful fish, shellfish and aquatic plants. Round gobies have already invaded the Great Lakes and have caused significant detrimental ecological impacts there by devouring native fishes and their eggs and by their aggressive habits of driving native species from their spawning, nursery and feeding areas.

The proposed amendment to current §57.111(14)(CC) would add the common name of the Anguilliidae family. The proposed amendment is necessary to improve clarity.

The proposed amendment to current §57.111(14)(EE) and (FF) would add two new families (Moronidae and Percichthyidae) to the definition of harmful or potentially harmful fish, shellfish and aquatic plants. The Asian and European Moronidae and the Percichthyidae are ecological counterparts of Texas native striped and white basses and would compete for the same ecological niches. The Moronidae have already become established in the Great Lakes, where they are known to eat the eggs of white bass and other native species and to hybridize with native bass. The Percichthyidae, or Chinese perches, also known as cold water groupers, are cold and salinity-tolerant fish with very large mouths that are very similar to bass and have the potential to be competitive to a detrimental extent with Texas native basses.

The proposed amendment to §57.111(15)(A) would expand the prohibition on harmful or potentially harmful crayfish from a single genus to all southern hemisphere species. Virtually all crayfish species can cause ecological problems when introduced

outside their natural ranges. Crayfish are a central component of freshwater food webs and ecosystems, acting as the dominant consumers of benthic invertebrates, detritus, macrophytes, and algae and as important forage for fish. Thus, additions to or removals of crayfish species from a native ecosystem often lead to large ecosystem effects, including changes in fish populations and losses in biodiversity. North American crayfish species are particularly susceptible to invasions from non-indigenous species because they have limited natural ranges. The single greatest threat to crayfish biodiversity worldwide is from accidental or intentional introduction of non-indigenous crayfish. In Europe, native crayfish have suffered from competition with introduced crayfish, but the greater impact has been caused by a fungal plague carried by non-indigenous species. Consequently, it is prudent to restrict non-indigenous crayfish species now before they become components of the aquaculture or pet industries and emerge as a significant problem.

The proposed amendment to current §57.111(15)(C), (E) and (G) reflects reclassifications and makes clarifications. Under the current rules, a single genus of giant rams-horn snails and a single species of applesnails are prohibited. The proposed amendment would expand the prohibition to include the entire family, which now includes both of these groups as a result of reclassification. The expansion is necessary because many of these snails are significant crop and ecological pests, eating plants and carrying diseases and parasites. An exception has been made for spiketop applesnail, which is the primary snail sold for aquarium culture. Spiketop applesnail is not cold-tolerant, does not eat larger aquatic plants, and is unlikely to become established or problematic in Texas. The amendment also alters taxonomic references to reflect reclassification within the Penaeid shrimp family by the scientific community, which is necessary to maintain accurate taxonomic references.

The proposed amendment to current §57.111(16)(A), (C), (I), and (L) would revise scientific names, include alternate common names (duckweed, water spinach) to reflect reclassification of certain species by the scientific community (waterhyacinth), and would add eight species to the list of harmful or potentially harmful exotic aquatic plants in order to be consistent with United States Department of Agriculture and Texas Department of Agriculture regulations. The amendment is necessary to improve accuracy and clarity, and to ensure that the rules do not conflict with federal provisions.

The proposed amendment to current §57.111(17) and (29) would clarify the boundary description of the harmful or potentially harmful exotic species exclusion zone and explicitly state that shellfish and/or water from a quarantined facility may not come into contact with public water. The proposed amendment is necessary to more accurately identify the area of the state to which the exclusion provisions apply, and to explicitly state a prohibition so as to remove the possibility of ambiguity.

The proposed amendment to current §57.111(30) would add a definition for "shellfish disease specialist." The amendment is necessary because the provisions of §57.114, concerning Health Certification of Exotic Shellfish, require that exotic shellfish be certified as disease free by a shellfish disease specialist. The proposed amendment establishes the criteria that a person must meet in order to be regarded by the department as qualified to certify the health status of exotic shellfish.

Robert Macdonald, regulations coordinator, has determined that for each of the first five years that the rules as proposed are in effect, there will be slight fiscal implications to state government as a result of enforcing or administering the rules. The department will realize revenue of $250 per person for any person who is required to obtain an exotic species permit. If all persons currently propagating or selling live Parastacidae choose to continue doing so, the department would realize a revenue increase of $1,250 per year. There will be no cost to the department because the required duties are already being carried out by existing personnel. There will be no fiscal implications for units of local government as a result of enforcing or administering the rules as proposed.

Mr. Macdonald also has determined that for each of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing or administering the rules as proposed will be the protection of the state's aquatic ecosystems from exotic species. The adverse effects of intentional and accidental introductions of exotic aquatic species into natural aquatic systems have been widely studied and documented around the world. The impact of a specific exotic species on a given native ecosystem is difficult to predict, but in general terms, the threat potential can be characterized by 1) evidence that the species is invasive elsewhere, 2) potential suitable range, 3) reproductive potential, 4) habitat quality, 5) the presence/absence of similar species, 6) the prey/predator relationship within the prospective habitat, and 7) food abundance. In addition, other factors, such as dispersal dynamics, can affect the efficacy of establishment. Once established, invasive exotic species are extremely difficult if not impossible to eliminate. Additionally, the rules will be clearer, more accurate, and more consistent, which will facilitate compliance and therefore enhance the department's ability to protect the native aquatic natural resources of the state.

The department has determined that there will be no adverse economic effect on small businesses, microbusinesses, and persons required to comply with the rules as proposed, unless the business or person is engaged in the propagation and sale of live crayfish of the family Parastacidae. Under current rule, Parastacidae may be propagated and sold live by anyone to anyone. Under the proposed rules, the propagation, possession, or sale of live Parastacidae would be unlawful without an exotic species permit issued by the department, except for live Parastacidae sold to restaurants for on-premises consumption or live Parastacidae shipped out of state. Under the proposed rule, no permit would be required for sale or possession of dead Parastacidae. Therefore, the potential adverse economic effect to small businesses, microbusinesses, and persons required to comply with the rules as proposed would be: 1) The cost of $250 per year for an exotic species permit, and 2) any business lost as a consequence of the prohibition of the intrastate sale of live Parastacidae for the pet trade.

In addition to the permit fee, persons required to comply with the rules would incur the costs associated with recordkeeping and reporting; however, the department estimates that a permitee would spend no more than eight hours per year completing the annual report. The permit fee and reporting requirements would apply equally to small businesses, micro-business, and larger businesses; however, the department believes that all persons and businesses affected by the rules are small or micro-businesses. Thus, there is no difference between cost of compliance on small and micro-business versus larger businesses. Therefore, the cost of compliance for a business with one employee would be $250 per employee per year in out-of-pocket expenses and eight hours of staff time per employee. For businesses with 20 employees, the cost of compliance would be $12.50 per em-

ployee per year and slightly over one hour of staff time per employee per year.

In order to determine the cost of compliance in terms of potential loss of pet-trade business, the department contacted, by telephone, 56 businesses (in Amarillo, Austin, Brownsville, Corpus Christi, Dallas, El Paso, Fort Worth, Houston, San Antonio, and Weatherford) that the department determined might engage in the sale of aquatic pets. The businesses were asked if they currently sell, had ever sold, or intended to sell live Parastacidae. Two businesses stated that they very rarely obtained Australian redclaw crayfish. Four businesses stated that they could order Australian redclaw crayfish if requested to do so by a customer. The remaining 50 business indicated that they did not carry Australian redclaw crayfish. Each business was also asked if they were aware of anyone else in the state who might be engaged in the propagation or sale of live Parastacidae, and if so, to provide contact information.

Based on the responses from the telephone contacts, the department sent a questionnaire (by standard and certified U.S. mail) to each of the six businesses that indicated they have engaged or intended to engage in the sale of Australian redclaw crayfish, as well as the three persons known to propagate Australian redclaw crayfish in Texas. As a result, since both respondents indicated that they had no employees other than themselves, the cost of compliance per employee would be $170 per year.

The department received two completed questionnaires, both from persons engaged in the propagation of Australian redclaw crayfish. Neither respondent reported that their respective businesses employed staff beside themselves. One respondent reported that he invested approximately 100 hours of labor per year in the cultivation of Parastacidae, but had not sold any. The other respondent reported the investment of approximately 365 hours per year in the cultivation of Parastacidae, with sales of approximately $170 per year for the last three years.

Based on the data reported, the department has determined that most if not all businesses and persons affected by the proposed rules are small or microbusinesses; thus, there is no difference between the cost of compliance for small and micro-business versus larger businesses. Based on the same data, the department has also determined that the highest cost of compliance, assuming that all sales are for the intrastate pet trade, is approximately $170 per year.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rules as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rules because Chapter 2007 does not apply to rules controlling non-indigenous or exotic aquatic resources.

Regulatory Impact Analysis. Although Government Code §2001.0225, Regulatory Analysis of Major Environmental Rules, does not apply to this proposed rule, TPWD nonetheless provides the regulatory analysis, as follows. The benefit TPWD anticipates as a result of implementing the rule is protection of native aquatic ecosystems from the potential adverse effects of introduced species. The adverse effects of intentional and accidental introductions of exotic aquatic species into natural aquatic systems have been widely studied and documented around the world. Once established, invasive exotic species are extremely difficult if not impossible to eliminate.

The proposed new rules will minimize cost and avoid unnecessary duplication by clarifying many scientific and popular names, therefore decreasing confusion and lessening the cost of compliance.

Persons required to comply with the rule will incur the costs associated with 1) The cost of $250 per year for an exotic species permit, 2) any business lost as a consequence of the prohibition of the intrastate sale of live Parastacidae for the pet trade, and 3) approximately eight hours per year for reporting and record-keeping if a permit is required.

An alternative method of achieving the purpose of the rule that was considered was banning the sale of both live and dead Parastacidae to both in-state and out-of-state buyers. It was determined that, given present knowledge regarding this family, this approach would unnecessarily affect the business of raising Parastacidae for human consumption or sale out-of-state, accordingly, the department has proposed a less-restrictive rule.

Data and methodology used include the following studies, as well as surveys of the industry.

Cook, B., S. Choy, and J. Davie. undated. Potential ecological impacts of translocating redclaw crayfish, Cherax quadricarinatus. Online abstracts. www.vims.edu/tcs/ICC5_abstracts.htm.

De Moor, I. 2002. Potential impacts of alien freshwater crayfish in South Africa. African Journal of Aquatic Science 27:125-139.

Hanson, J.M., P.A. Chambers, and E.E. Prepas. 1990. Selective foraging by the crayfish Orconectes virilis and its impact on macroinvertebrates. Freshwater Biology 24:69-80.

Hepworth, D.K., and D.J. Duffield. 1987. Interactions between an exotic crayfish and stocked rainbow trout in Newcastle Reservoir, Utah. North American Journal of Fisheries Management 7:554-561.

Kats, L.B. and R.P. Ferrer 2003. Alien predators and amphibian declines: review of two decades of science and the transition to conservation. Diversity and Distributions 9:99-110.

Hobbs H. H. I.; Jass J. P.; and Huner J. V. 1989 A review of global crayfish introductions with particular emphasis on two North American species (Decapoda, Cambaridae). Crustaceana 56:303-309.

Huner J. V. 1977. Introductions of the Louisiana red swamp crayfish, Procambarus clarkii (Girard); an update. Freshwater Crayfish 3:193-202.

Lodge, D.M., M.W. Kershner, J.E. Aloi, and A.P. Covich. 1994. Effects of an omnivorous crayfish (Orconectes rusticus) on freshwater littoral food web. Ecology 75:1265-1281.

Lodge, D.M., T.K. Kratz, and G.M. Capelli. 1986. Long-term dynamics of three crayfish species in Trout Lake, Wisconsin. Can. J. Fish. Aquat. Sci. 43:993-998.

Lodge, D.M., and J.G. Lorman. 1987. Reductions in submersed macrophyte biomass and species richness by the crayfish Orconectes rusticus. Can. J. Fish. Aquat. Sci. 44:591-597.

Lodge, D.M., C.A. Taylor, D.M. Holdich, and J. Skurdal. 2000a. Nonindigenous crayfishes threaten North American freshwater biodiversity: lessons from Europe. Fisheries Vol. 25, No. 8:7-20.

Lodge, D.M., C.A. Taylor, D.M. Holdich, and J. Skurdal. 2000b. Reducing impacts of exotic crayfish introductions: new policies needed. Fisheries Vol. 25, No. 8:21-23.

Lorman J.G. and J.J. Magnuson. 1978. The role of crayfishes in aquatic ecosystems. Fisheries 3:6-8.

Masser, M.P. and D.B. Rouse. 1997. Red claw crayfish. Southern Regional Aquaculture Center. SRAC Publication No. 244.

Momot W. T. 1995. Redefining the role of crayfish in aquatic ecosystems. Reviews in Fisheries Science 3:33-63.

Olsen, T.M., D.M. Lodge, G.M. Capelli, and R.J. Houlihan. 1991. Mechanisms of impact on an introduced crayfish (Orconectes rusticus) on littoral congeners, snails, and macrophytes. Can. J. Fish. Aquat. Sci. 48:1853-1861.

Piper, L. 2000. Potential for expansion of freshwater crayfish industry in Australia. Rural Industries Research and Development Corporation. RIRDC Publication No. 00/142.

Short, W.J. 2000. Crustaceans 1 freshwater crayfish. Leaflet 0057, Queensland Museum, South Brisbane Australia.

Williams, E.H. Jr., L. Bunkley-Williams, C.G. Lilyestrom, and E.A.R. Ortiz-Corps. 2001. A review of recent introductions of aquatic invertebrates in Puerto Rico and implications for the management of nonindigenous species. Caribbean Journal of Science, Vol. 37, No. 3-4, 246-251.

TPWD is not aware of a performance-oriented, voluntary, or market-based approach that would substitute for the proposed rule. The opportunity for public comments set forth below applies as well to the draft impact analysis and all comments on the draft impact analysis will be addressed in the publication of the final regulatory analysis.

A consistency determination is not required under 31 TAC Chapter 505 because the proposed amendments do not involve any of the four threshold actions that would subject the proposed rules to a consistency review under the Coastal Management Program.

Comments on the proposed rules may be submitted to Joedy Gray, Texas Parks and Wildlife Department 4200 Smith School Road, Austin, Texas, 78744; (512) 389-8037 (e-mail: joedy.gray@tpwd.state.tx.us).

The amendments are proposed under the authority of Parks and Wildlife Code, §66.007, which authorizes the commission to regulate the importation, possession, sale, and placing into the water of this state harmful or potentially harmful exotic fish, shellfish and aquatic plants, and under Agriculture Code, §134.020, which authorizes the commission to regulate the importation, propagation, and sale of harmful or potentially harmful exotic species by an aquaculturist.

The proposed amendments affect Parks and Wildlife Code, Chapter 66 and Agriculture Code, Chapter 134.

§57.111. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Aquaculture or fish farming--The business of producing and selling cultured species raised in private facilities.

(2) Aquaculturist or fish farmer--Any person engaged in aquaculture.

(3) Aquaculture facility--The property, including all drainage ditches and private facilities where cultured species are produced, held, propagated, transported or sold.

(4) Aquaculture complex--A group of two or more separately owned aquaculture facilities located at a common site and sharing privately owned water diversion or drainage structures.

(5) Beheaded--The complete detachment of the head (that portion of the fish from the gills to the nose) from the body.

(6) [~~(2)~~] Certified Inspector--An employee of the Texas Parks and Wildlife Department [~~or the Texas A&M Sea Grant College Program~~] who has satisfactorily completed a department approved course in clinical analysis of shellfish.

(7) [~~(3)~~] Cultured species--Aquatic plants or wildlife resources raised under conditions where at least a portion of their life cycle is controlled by an aquaculturist.

(8) [~~(4)~~] Clinical Analysis Checklist--A TPWD [~~an inspection~~] form [~~provided by the department~~] specifying sampling protocols and listing certain characteristics which may constitute manifestations of disease.

(9) [~~(5)~~] Department--The Texas Parks and Wildlife Department or a designated employee of the department.

(10) [~~(6)~~] Director--The executive director of the Texas Parks and Wildlife Department.

(11) [~~(7)~~] Disease--Contagious pathogens or injurious parasites which may be a threat to the health of natural populations of aquatic organisms.

(12) [~~(8)~~] Disease-Free--A status, based on the results of an examination conducted by a department approved shellfish disease specialist that certifies a group of aquatic organisms as being free of disease.

(13) [~~(9)~~] Exotic species--A nonindigenous plant or wildlife resource not normally found in public water of this state.

[~~(10) Fish farm--The property including all drainage ditches and private facilities from which cultured species are produced, held, propagated, transported, or sold.~~]

[~~(11) Fish farm complex--A group of two or more separately owned fish farms located at a common site and sharing privately owned water diversion or drainage structures.~~]

[~~(12) Fish farmer--Any person holding a valid license to engage in aquaculture or fish farming under Agriculture Code, Chapter 134.~~]

(14) [~~(13)~~] Grass carp--The species Ctenopharyngodon idella.

(15) Gutted--The complete removal of all internal organs and entrails.

(16) [~~(14)~~] Harmful or potentially harmful exotic fish--

(A) Lampreys Family: Petromyzontidae--all species except Ichthyomyzon castaneus and I. gagei;

(B) Freshwater Stingrays Family: Potamotrygonidae--all species;

(C) Arapaima Family: Osteoglossidae--Arapaima gigas;

(D) South American Pike Characoids Family: Characidae--all species of genus Acestrorhyncus;

(E) African Tiger Fishes Family, Subfamily Alestiidae: Hydrocyninae--all species of genus Hydrocynus;

(F) Piranhas and Pirambebas: Family Serrasalmideae, [Priambebus] Subfamily: Serrasalminae--all species except pacus of the genus Piaractus;

(G) Payara and other wolf or vampire tetras: Family Characidae, [Rhaphiodontid Characoids] Subfamily: Rhaphiodontinae--all species of genera Hydrolycus and Rhaphiodon, including Cynodon [(synonymous with Cynodon)];

(H) Dourados: Family Characidae, Subfamily: Bryconinae--all species of genus Salminus;

(I) South American Tiger Fishes Family: Erythrinidae--all species;

(J) South American Pike Characoids Family: Ctenolucidae--all species of genera Ctenolucius and Boulengerella, including Luciocharax [(synonymous with Boulengerella)] and Hydrocinus[)];

(K) African Pike Characoids Families: Hepsetidae and Ichthyboridae--all species;

(L) Electric Eels Family: Electrophoridae--Electrophorus electricus;

(M) Carps and Minnows Family: Cyprinidae--all species and hybrids of species of genera: Aspius, Pseudoaspius, Aspiolucius (Asps); Abramis, Blicca, Megalobrama, Parabramis (Old World Breams); Hypophthalmichthys or Aristichthys (Bighead Carp); Mylopharyngodon (Black Carp); Ctenopharyngodon (Grass Carp); Cirrhinus (Mud Carp); Thynnichthys (Sandkhol Carp); Hypophthalmichthys (Silver Carp); Catla (Catla); Leuciscus (Old World Chubs, Ide, Orfe, Daces); Tor, including the species Barbus hexiglonolepsis (Giant Barbs and Mahseers); Rutilus (Roaches); Scardinius (Rudds); Elopichthys (Yellowcheek); Catlocarpio (Giant Siamese Carp); all species of the genus Labeo (Labeos) except Labeo chrysophekadion (Black SharkMinnow) [Abramis, Aristichthys, Aspius, Aspiolucius, Blicca, Catla, Cirrhina, Ctenopharyngodon, Elopichthys, Hypophthalmichthys, Leuciscus, Megalobrama, Mylopharyngodon, Parabramis, Pseudaspius, Rutilus, Scardinius, Thynnichthys, Tor, and the species Barbus tor (synonymous with Barbus hexoagoniolepis)];

(N) Walking Catfishes Family: Clariidae--all species;

(O) Electric Catfishes Family: Malapteruridae--all species;

(P) South American Parasitic Candiru Catfishes Subfamilies: Stegophilinae and Vandelliinae--all species;

(Q) Pike Killifish Family: Poeciliidae--Belonesox belizanus;

(R) Marine Stonefishes Family: Synanceiidae--all species;

(S) Tilapia Family: Cichlidae--all species of genera [genus] Tilapia, Oreochromis and Saratherodon [(including Sarotherodon and Oreochromis)];

(T) Asian Pikeheads Family: Luciocephalidae--all species;

(U) Snakeheads Family: Channidae--all species;

(V) Old World Pike-Perches [Walleyes] Family: Percidae--all species of the genus Sander except Sander vitreum [Stizostedion except Stizostedion vitreum] and S. canadense;

(W) Nile Perch Family: Centropomidae (also called Latidae)--all species of genera Lates and Luciolates;

(X) Seatrouts and Corvinas [Drums] Family: Sciaenidae--all species of genus Cynoscion except Cynoscion nebulosus, C. nothus, and C. arenarius;

(Y) Whale Catfishes Family: Cetopsidae--all species;

(Z) Ruffe [Ruff] Family: Percidae--all species of genus Gymnocephalus;

(AA) Air sac Catfishes Family: Heteropneustidae-all species;

(BB) Swamp Eels, Rice Eels or One-Gilled Eel Family: Synbranchidae--all species;

(CC) Freshwater Eels family: Anguilliidae--all species except Anguilla rostrata;

(DD) Round Gobies Family: Gobiidae--all species of genus Neogobius, including N. melanostoma [Heteropneustidae--All species of genus Heteropneustes].

(EE) Temperate Basses Family: Moronidae--all species except for Morone saxatilis, M. chrysops and M. mississippiensis and hybrids between these three species;

(FF) Temperate Perches Family: Percichthyidae--all species, including species of the genus Siniperca (Chinese perches).

(17) [(15)] Harmful or potentially harmful exotic shellfish--

(A) Crayfishes Family: Parastacidae--all species [of the genus Astacopsis];

(B) Mittencrabs Family: Grapsidae--all species of genus Eriocheir;

(C) [(D)] Zebra Mussels Family: Dreissenidae--all species of genus Dreissena;

[(C) Giant Ram's-horn Snails Family: Piliidae (synonymous with Ampullariidae)--all species of genus Marisa;]

(D) [(E)] Penaeid Shrimp Family: Penaeidae--all species of genera [genus] Penaeus, Litopenaeus, Farfantepenaeus, Fenneropenaeus, Marsupenaeus, and Melicertus (all previously considered Penaeus) except L. setiferus, Far. [F.] aztecus and Far. [F.] duorarum.

(E) [(F)] Oyster Family: Ostreidae--all species except Crassostrea virginica and Ostrea equestris.

(F) [(G)] Applesnails and Giant Rams-Horn Snail: all genera and species of the Family Ampullariidae (previously called Piliidae), including Pomacea and Marisa, except spiketop applesnail (Pomacea bridgesii) [Applesnails Family: Ampullariidae--Channeled Applesnail (Pomacea canaliculata)].

(18) [(16)] Harmful or potentially harmful exotic plants--

(A) Giant or Dotted Duckweed Family: Lemnaceae--Landolita punctata [Spirodela oligorhiza];

(B) Salvinia Family: Salviniaceae--all species of genus Salvinia;

(C) Waterhyacinth Family: Pontederiaceae--Eichhornia crassipes (floating waterhyacinth) and E. azurea (rooted waterhyacinth);

(D) Waterlettuce Family: Araceae--Pistia stratiotes;

(E) Hydrilla Family: Hydrocharitaceae--Hydrilla verticillata;

(F) Lagarosiphon Family: Hydrocharitaceae--Lagarosiphon major;

(G) Eurasian Watermilfoil Family: Haloragaceae--Myriophyllum spicatum;

(H) Alligatorweed Family: Amaranthaceae--Alternanthera philoxeroides;

(I) [~~(J)~~] Paperbark Family: Myrtaceae--Melaleuca quinquenervia;

~~[(I) Rooted Waterhyacinth Family: Pontederiaceae--Eichhornia azurea;]~~

(J) [~~(K)~~] Torpedograss Family: Gramineae--Panicum repens;

(K) [~~(L)~~] Water spinach (also called ong choy, rau mong and kangkong) Family: Convolvulaceae--Ipomoea aquatica [~~aquatic~~].

(L) Ambulia--Limnophila sessiflora;

(M) Narrowleaf False Pickerelweed--Monochoria hastata;

(N) Heartshaped False Pickerelweed--Monochoria vaginalis;

(O) Duck-lettuce--Ottelia alismoides;

(P) Wetland Nightshade--Solanum tampicense;

(Q) Exotic Bur-reed--Sparganium erectum;

(R) Brazilian Peppertree--Schinus terebinthifolius;

(S) Purple Loosestrife--Lythrum salicaria.

(19) [~~(17)~~] Harmful or potentially harmful exotic species exclusion zone--That part of the state that is both [~~area~~] south of SH 21 and east of I-35, but[~~, from its intersection with the Texas/Louisiana border, approximately five miles due east of Milam, Texas,~~] not including [~~that area of~~] Brazos County [~~south of SH 21, to San Marcos; thence south of IH 35 to Laredo~~].

(20) [~~(18)~~] Immediately--Without delay; with no intervening span of time.

(21) [~~(19)~~] Manifestations of disease--Manifestations of disease include, but are not limited to, one or more of the following: heavy or unusual predator activity, empty guts, emaciation, rostral deformity, digestive gland atrophy or necrosis, gross pathology of shell or underlying skin typical of viral infection, fragile or atypically soft shell, gill fouling, or gill discoloration.

(22) [~~(20)~~] Nauplius or nauplii--A larval crustacean having no trunk segmentation and only three pairs of appendages.

(23) [~~(21)~~] Operator--The person responsible for the overall operation of a wastewater treatment facility.

(24) [~~(22)~~] Place of business--A permanent structure on land where aquatic products or orders for aquatic products are received or where aquatic products are sold or purchased.

(25) [~~(23)~~] Post-larvae [~~Postlarva~~]--A juvenile crustacean having acquired a full complement of functional appendages.

(26) [~~(24)~~] Private facility--A pond, tank, cage, or other structure capable of holding cultured species in confinement wholly within or on private land or water, or within or on permitted public land or water.

(27) [~~(25)~~] Private facility effluent--Any and all water which has been used in aquaculture activities.

(28) [~~(26)~~] Private pond--A pond, tank, lake, or other structure capable of holding cultured species in confinement wholly within or on private land.

(29) [~~(27)~~] Public aquarium--An American Association of Zoological Parks and Aquariums accredited facility for the care and exhibition of aquatic plants and animals.

(30) [~~(28)~~] Public waters--Bays, estuaries, and water of the Gulf of Mexico within the jurisdiction of the state, and the rivers, streams, creeks, bayous, reservoirs, lakes, and portions of those waters where public access is available without discrimination.

(31) [~~(29)~~] Quarantine condition--Confinement of exotic shellfish such that neither the shellfish nor the water in which they are or were maintained comes into contact with water in the state and with other fish and/or [~~or~~] shellfish.

(32) Shellfish disease specialist-A person with a degree in veterinary medicine or a Ph.D. who specializes in disease of shellfish.

(33) [~~(30)~~] Triploid grass or black carp--A grass carp (Ctenopharyngodon idella) or black carp (Mylophryngodon piceus) that [~~which~~] has been certified by the United States Fish and Wildlife Service as having 72 chromosomes and as being functionally sterile.

(34) [~~(31)~~] Waste--Waste shall have the same meaning as in Chapter 26, §26.001(6) of the Texas Water Code.

(35) [~~(32)~~] Water in the state--Water in the state shall have the same meaning as in Chapter 26, §26.001(5) of the Texas Water Code.

(36) [~~(33)~~] Wastewater treatment facility--All contiguous land and fixtures, structures or appurtenances used for treating wastewater pursuant to a valid permit issued by the Texas Commission on Environmental Quality.

§57.113. Exceptions.

(a) A person who holds a valid Exotic Species Permit issued by the department may possess, propagate, sell and transport to the permittee's private facilities exotic harmful or potentially harmful fish, shellfish and aquatic plants only as authorized in the permit provided the harmful or potentially harmful exotic species are to be used exclusively:

(1) as experimental organisms in a department approved research program; or

(2) for exhibit in a public aquarium approved for display of harmful or potentially harmful exotic fish, shellfish and aquatic plants.

(b) A person may possess exotic harmful or potentially harmful fish or shellfish, exclusive of grass carp, without a permit, if the [~~intestines of the~~] fish or shellfish have been gutted [~~removed~~], or in the case of oysters, if the oysters have been shucked or otherwise removed from their shells.

(c) A person may possess grass carp harvested from public waters that have not been permitted for triploid grass carp, without a permit, if the grass carp [~~intestines~~] have been gutted [~~removed~~].

(d) An aquaculturist [~~A fish farmer~~] who holds a valid exotic species permit issued by the department may possess, propagate, transport or sell water spinach, triploid grass carp [~~(Ctenopharyngodon idella)~~], silver carp [~~(Hypophthalmicthys molitrix)~~], triploid black carp [~~(Mylophryngogon piceus, also~~], commonly known as snail carp[~~)~~], bighead carp [~~(Aristichthys/Hypophthalmicthys nobilis)~~], blue tilapia (Oreochromis aureusa [~~Tilapia aurea~~]), Mozambique tilapia

(O. mossambica [~~Tilapia mossambica~~]), Nile tilapia (O. nilotocusa [~~Tilapia nilotica~~]), [~~water spinach (Ipomoea aquatica),~~] or hybrids between the three tilapia species, unless otherwise provided by conditions of the permit or these rules.

(e) An aquaculturist [~~A fish farmer~~] who holds a valid exotic species permit issued by the department may possess, propagate, transport, or sell Pacific white shrimp (Litopenaeus vannamei) provided the exotic shellfish meet disease free certification requirements listed in §57.114 of this title (relating to Health Certification of Exotic Shellfish) and as provided by conditions of the permit and these rules.

(f) An operator of a wastewater treatment facility in possession of a valid exotic species permit issued by the department may possess and transport permitted exotic species to their facility only for the purpose of wastewater treatment.

(g) A person may possess Mozambique tilapia in a private pond or private facility subject to compliance with §57.116(d) of this title (relating to Exotic Species Transport Invoice).

(h) The holder of a valid triploid grass carp permit issued by the department may possess triploid grass carp as provided by conditions of the permit and these rules.

(i) A licensed retail or wholesale fish dealer is not required to have an exotic species permit to purchase or possess:

(1) live individuals of triploid grass carp, silver carp, triploid black carp, bighead carp, blue tilapia, Mozambique tilapia, Nile tilapia [~~species~~] or hybrids of those species [~~listed in subsection (d) of this section~~] held in the place of business, unless the retail or wholesale fish dealer propagates one or more of these species. However, such a dealer may sell or deliver these species to another person only if the fish have been gutted or beheaded [~~the intestines or head of the fish are removed~~]; or

(2) Live Pacific white shrimp (Litopenaeus vannamei) held in the place of business if the place of business is not located within the exclusion zone described in §57.111 of this title (relating to Definitions) [~~Harmful or Potentially Harmful Exotic Species Exclusion Zone~~]. However, such a dealer may only sell or deliver this species to another person if the shrimp are dead and packaged on ice or frozen.

(j) The department is authorized to stock triploid grass carp into public waters in situations where the department has determined that there is a legitimate need, and when stocking will not affect threatened or endangered species, coastal wetlands, or specific management objectives for other important species.

(k) An aquaculturist [~~A fish farmer~~] who holds a valid exotic species permit issued by the department may possess, propagate, transport and sell Pacific blue shrimp (Litopenaeus stylirostris) provided the exotic shellfish are cultured under quarantine conditions in private facilities located outside the harmful or potentially harmful exotic species exclusion zone, and meet disease free certification requirements listed in §57.114 of this title (relating to Health Certification of Exotic Shellfish) and as provided by conditions of the permit and these rules.

(l) A person operating [~~An operator of~~] a mechanical plant harvester in accordance with the provisions [~~possession~~] of a valid exotic species permit issued by the department may remove and dispose of prohibited plant species from public or private waters only by means authorized in the permit.

(m) Any person may possess water [~~Water~~] spinach [~~(Ipomoea aquatica)~~] for personal consumption.

(n) An aquaculturist who holds a valid exotic species permit issued by the department may possess, propagate, transport, and sell Parastacidae. Live Parastacidae may be possessed without a permit only:

(1) at a restaurant or other food service establishment for purposes of on-premises consumption as food; or

(2) while being transported to an out-of-state destination.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606548
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 389-4775

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CHAPTER 58. OYSTERS AND SHRIMP
SUBCHAPTER B. STATEWIDE SHRIMP FISHERY PROCLAMATION

31 TAC §58.161

The Texas Parks and Wildlife Department proposes an amendment to §58.161, concerning Shrimping in Outside Waters. The proposed amendment would delegate authority to the Executive Director of the Department to open and close the summer shrimp season in the outside waters of the Gulf of Mexico.

Parks and Wildlife Code, Chapter 77, authorizes the Parks and Wildlife Commission (Commission) to regulate the take, attempted take, possession, purchase, and sale of shrimp resources from the salt waters of Texas.

Under Parks and Wildlife Code, §77.062, the Commission is authorized to delegate to the Executive Director the authority to open and close the summer gulf shrimp season in the outside waters of the state. Prior to the Commission adoption of the Shrimp Fishery Management Plan (SFMP) in 1989, the Commission had been authorized by the Shrimp Management Act of 1959 to alter the gulf closed season to provide for an earlier, later, or longer season not to exceed 60 days, and was authorized to delegate that authority to the Executive Director, provided the openings and closures were based on sound biological data. Historically, Texas state waters have been managed by the mechanism of delegated authority. In 1981, a coordinated effort to close both state and federal waters became known as the "Texas Closure" and since that time, such closures also have been implemented via delegation of authority.

Prior to the adoption of the SFMP and since the adoption of the plan, the Executive Director has exercised delegated rulemaking authority under Parks and Wildlife Code, Chapter 77, and the applicable provisions of the SFMP.

The delegation of authority by rule is consistent with commission practice. For example, under Parks and Wildlife Code, Chapter 64, the Commission is authorized to delegate rulemaking authority to the Executive Director with respect to regulations concerning migratory game birds. The delegation of this rulemaking authority is explicitly set forth in Title 31, Chapter 65, Subchapter

N, of the Texas Administrative Code. The department believes that the delegation of regulatory authority by rule aids the public in understanding the workings of the department and should be used at every opportunity; therefore, the proposed amendment explicitly codifies the delegated rulemaking authority of the Executive Director to open and close the summer shrimp season in the outside state waters of the Gulf of Mexico.

Robin Riechers, Director of Science and Policy, has determined that for each year of the first five years that the proposed amendment is in effect, there will be no fiscal implications to state or local governments as a result of administering or enforcing the amended rule.

Mr. Riechers also has determined that for each year of the first five years the amendment as proposed is in effect, the public benefit expected as a result of the amended rule will be a codified delegation of rulemaking authority to the Executive Director, which eliminates any confusion concerning the rulemaking authority of the Executive Director with respect to summer shrimp season in the Gulf of Mexico.

There will be no adverse economic effect on small businesses, micro businesses, and persons required to comply with the amendment as proposed.

The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules) does not apply to the proposal.

The department has determined that Government Code, Chapter 2007 (Governmental Action Affecting Private Property Rights), does not apply to the proposal.

A consistency determination is not required under 31 TAC Chapter 505 because the proposed amendments do not involve any of the four threshold actions that would subject the proposal to a consistency review under the Coastal Management Program.

Comments on the proposal may be submitted to Jerry L. Cooke, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744; (512) 389-4492; e-mail: jerry.cooke@tpwd.state.tx.us.

The amendment is proposed under the authority of Parks and Wildlife Code, Chapter 77, which authorizes the commission to delegate to the director the duties and responsibilities of opening and closing the shrimping season under Chapter 77.

The proposed amendment affects Parks and Wildlife Code, Chapter 77.

§58.161. Shrimping in Outside Waters.

(a) - (c) (No change.)

(d) Gulf shrimping seasons. The outside waters are open to shrimping except:

(1) - (2) (No change.)

(3) Summer closed season:

(A) (No change.)

(B) The commission may change the opening and closing dates to provide an earlier, later, or longer closed season not to exceed 75 days, and delegates to the executive director the authority to open and close the season as provided in Parks and Wildlife Code, §77.062.

(C) (No change.)

(4) - (5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 8, 2006.

TRD-200606589
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 389-4775

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION
SUBCHAPTER G. CIGARETTE TAX

34 TAC §3.101

The Comptroller of Public Accounts proposes an amendment to §3.101, concerning cigarette tax and stamping activities. This section is being amended pursuant to the 79th Legislature, 2006, 3rd Called Session, House Bill 5. House Bill 5 increases the excise tax on cigarettes to $70.50 per thousand on cigarettes weighing three pounds or less per thousand. Subsection (a) is amended accordingly.

John Heleman, Chief Revenue Estimator, has determined that, for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that, for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in clarifying the new rate of the cigarette tax. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002 and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendment implements Tax Code, §154.021(b)(1).

§3.101. Cigarette Tax and Stamping Activities.

(a) Imposition of tax. A tax is imposed on a person who uses or disposes of cigarettes in this state. The tax rate is $70.50[~~$20.50~~] per thousand on cigarettes weighing three pounds or less per thousand plus $2.10 per thousand on cigarettes weighing more than three pounds per thousand. The tax becomes due and payable when a person in this state receives cigarettes to make a first sale. The ultimate consumer or

user of cigarettes in this state bears the impact of the tax; and, if another person pays the tax, the amount of the tax is added to the price to the ultimate consumer or user. A person who pays the tax shall securely affix a stamp to each individual package of cigarettes to show payment of the tax. Absence of a stamp on an individual package of cigarettes is notice that the tax has not been paid.

(b) - (j) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 4, 2006.

TRD-200606482
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 475-0387

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SUBCHAPTER H. CIGAR AND TOBACCO TAX

34 TAC §3.121

The Comptroller of Public Accounts proposes an amendment to §3.121, concerning definitions, imposition of tax, permits, and reports. This section is being amended pursuant to 79th Legislature, 3rd Called Session, 2006, House Bill 5. House Bill 5 increases the excise tax on tobacco products other than cigars to 40 percent of the manufacturer's list price, exclusive of any trade discount, special discount, or deal. Subsection (b)(1)(B) is amended accordingly.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of enforcing the rule will be in clarifying the new rate of the other tobacco products tax. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002 and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendment implements Tax Code, §155.0211(b).

§3.121. Definitions, Imposition of Tax, Permits, and Reports.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Bonded agent--A person in Texas who is an agent for a principal located outside of Texas and who receives cigars and tobacco products in interstate commerce and stores the cigars and tobacco products for distribution or delivery to distributors under orders from the principal.

(2) Cigar--A roll of fermented tobacco that is wrapped in tobacco and that the main stream of smoke from which produces an alkaline reaction to litmus paper.

(3) Common carrier--A motor carrier registered under Transportation Code, Chapter 643, or a motor carrier operating under a certificate issued by the Interstate Commerce Commission or its successor agency.

(4) Distributor--A person who:

(A) receives tobacco products from a manufacturer for the purpose of making a first sale in Texas;

(B) brings or causes to be brought into Texas tobacco products for sale, use, or consumption.

(5) Factory list price--The published manufacturer gross cost to the distributor.

(6) Export warehouse--A location in this state from which a person receives tobacco products from manufacturers and stores the tobacco products for the purpose of making sales to authorized persons for resale, use, or consumption outside the United States.

(7) First sale--Except as otherwise provided by this section, the term means:

(A) the first transfer of possession in connection with purchase, sale, or any exchange for value of tobacco products in intrastate commerce;

(B) the first use or consumption of tobacco products in this state; or

(C) the loss of tobacco products in this state whether through negligence, theft, or other loss.

(8) Importer or import broker--A person who ships, transports, or imports into Texas tobacco products manufactured or produced outside the United States for the purpose of making a first sale in this state.

(9) Manufacturer--A person who manufactures or produces tobacco products and sells tobacco products to a distributor.

(10) Manufacturer's representative--A person who is employed by a manufacturer to sell or distribute the manufacturer's tobacco products.

(11) Manufacturer's list price--The published manufacturer gross cost to the distributor. The term is synonymous with factory list price.

(12) Permit holder--A bonded agent, distributor, importer, manufacturer, wholesaler, or retailer required to obtain a permit under Tax Code, §155.041.

(13) Place of business--the term means:

(A) a commercial business location where tobacco products are sold;

(B) a commercial business location where tobacco products are kept for sale or consumption or otherwise stored and may not be a residence or a unit in a public storage facility; or

(C) a vehicle from which tobacco products are sold.

(14) Retailer--A person who engages in the practice of selling tobacco products to consumers and includes the owner of a coin-operated vending machine.

(15) Tobacco product--A cigar; smoking tobacco, including granulated, plug-cut, crimp-cut, ready-rubbed, and any form of tobacco suitable for smoking in a pipe or as a cigarette; chewing tobacco, including plug, scrap, and any kind of tobacco suitable for chewing; snuff or other preparations of pulverized tobacco; or an article or product that is made of tobacco or a tobacco substitute and that is not a cigarette.

(16) Trade discount, special discount, or deals--Includes promotional incentive discounts, quantity purchase incentive discounts, and timely payment or prepayment discounts.

(17) Weight of a cigar--The combined weight of tobacco and nontobacco ingredients that make up the total product in the form available for sale to the consumer, excluding any carton, box, label, or other packaging materials.

(18) Wholesaler--A person, including a manufacturer's representative, who sells or distributes tobacco products in this state for resale but who is not a distributor.

(b) Imposition of tax. A tax is imposed and becomes due and payable when a permit holder receives cigars or tobacco products for the purpose of making a first sale in this state.

(1) Tax Rates.

(A) the tax on cigars is calculated at

(i) $ .01 per 10 or fraction of 10 on cigars that weigh three pounds or less per thousand;

(ii) $7.50 per thousand on cigars that weigh more than three pounds per thousand and that are sold at factory list price, exclusive of any trade discount, special discount, or deal, for 3.3 cents or less each;

(iii) $11 per thousand on cigars that weigh more than three pounds per thousand and that are sold at factory list price, exclusive of any trade discount, special discount, or deal, for more than 3.3 cents each, and that contain no substantial amount of nontobacco ingredients; and

(iv) $15 per thousand on cigars that weigh more than three pounds per thousand and that are sold at factory list price, exclusive of any trade discount, special discount, or deal, for more than 3.3 cents each, and that contain a substantial amount of nontobacco ingredients.

(B) The tax rate for tobacco products other than cigars is 40%[~~35.213%~~] of the manufacturer's list price, exclusive of any trade discount, special discount, or deal.

(2) Free goods shall be taxed at the prevailing factory list price.

(3) A person who receives or possesses tobacco products on which a tax of more than $50 would be due is presumed to receive or possess the tobacco products for the purpose of making a first sale in this state. This presumption does not apply to common carriers or to manufacturers.

(4) A tax imposed on manufacturers, who manufacture tobacco products in this state, at the time the tobacco products are first transferred in connection with a purchase, sale, or any exchange for value in intrastate commerce.

(5) The delivery of tobacco products by a principal to its bonded agent in this state is not a first sale.

(6) If a manufacturer sells tobacco products to a purchaser in Texas and ships the products at the purchaser's request to a third party distributor in Texas, then the purchaser has received the tobacco products for first sale in Texas.

(7) The person in possession of cigars or tobacco products has the burden to prove payment of the tax.

(c) Permits required. To engage in business as a distributor, importer, manufacturer, wholesaler, bonded agent, or retailer a person must apply for and receive the applicable permit from the comptroller. The permits are not transferable.

(1) A person who engages in the business of a bonded agent, distributor, importer, manufacturer, wholesaler, or retailer without a valid permit is subject to a penalty of not more than $2,000 for each violation. Each day on which a violation occurs is a separate offense. A new application is required if a change in ownership occurs (sole ownership to partnership, sole ownership to corporation, partnership to limited liability company, etc.). Each legal entity must apply for its own permit(s). All permits issued to a legal entity will have the same taxpayer number.

(2) Each distributor, importer, manufacturer, wholesaler, bonded agent, or retailer shall obtain a permit for each place of business owned or operated by the distributor, importer, manufacturer, wholesaler, bonded agent, or retailer. A new permit shall be required for each physical change in the location of the place of business. Correction or change of street listing by a city, state, or U.S. Post Office shall not require a new permit so long as the physical location remains unchanged.

(3) Permits are valid for one place of business at the location shown on the permit. If the location houses more than one place of business under common ownership, an additional permit is required for each separate place of business. For example, a retailer must have a separate permit for each vending machine including several machines at one location.

(4) A vehicle from which cigars and tobacco products are sold is a place of business and requires a permit. A motor vehicle permit is issued to a bonded agent, retailer, distributor, or wholesaler holding a current permit. Vehicle permits are issued bearing a specific motor vehicle identification number and are valid only when physically carried in the vehicle having the corresponding motor vehicle identification number. Vehicle permits may not be moved from one vehicle to another. Each cigar or tobacco product manufacturers sales representative is required to purchase a wholesale dealer's permit for each manufacturer's vehicle operated. No cigar and tobacco product permit is required for a vehicle used only to deliver invoiced tobacco products.

(5) The comptroller may issue a combination permit for cigarettes, tobacco products, or cigarettes and tobacco products to a person who is a distributor, importer, manufacturer, wholesaler, bonded agent, or retailer as defined by [~~the~~] Tax Code, Chapter 154 and Chapter 155. A person who receives a combination permit pays only the higher of the two permit fees.

(6) The comptroller will not issue permits for a residence or a unit in a public storage facility because tobacco products must not be stored at such places.

(d) Permit Period.

(1) Bonded agent, distributor, importer, manufacturer, wholesaler, and motor vehicle permits expire on the last day of February of each year.

(2) Retailer permits expire on the last day of May of each even-numbered year.

(e) Permit Fees. An application for a bonded agent, distributor, importer, manufacturer, wholesaler, motor vehicle, or retailer permit must be accompanied by the required fee.

(1) The permit fee for a bonded agent is $300.

(2) The permit fee for a distributor is $300.

(3) The permit fee for a manufacturer with representation in Texas is $300.

(4) The permit fee for a wholesaler is $200.

(5) The permit fee for a motor vehicle is $15.

(6) The permit fee for a retailer permit issued or renewed after August 31, 1999, is $180. Retailers who fail to obtain or renew a retailer permit in a timely manner are liable for the fee in effect for the applicable permit period, in addition to the fee described in paragraph (7) of this subsection.

(7) A $50 fee is assessed, in addition to the regular permit fee, for failure to obtain or renew a permit in a timely manner.

(8) No permit fee is required to obtain an importer permit or to register a manufacturer when the manufacturer is located out of state with no representation in Texas.

(9) The comptroller prorates the permit fee for new permits according to the number of months remaining in the permit period. If a permit will expire within three months of the date of issuance, the comptroller may collect the prorated permit fee for the current permit period and the total permit fee for the next permit period.

(10) An unexpired permit may be returned to the comptroller for credit on the unexpired portion only upon the purchase of a permit of a higher classification.

(f) Permit issuance, denial, suspension, or revocation.

(1) The comptroller shall issue a permit to a distributor, importer, manufacturer, wholesaler, bonded agent, or retailer if the comptroller has received an application and any applicable fee, the applicant has complied with Tax Code, §155.041, and the comptroller determines that the issuance of such permit will not jeopardize the administration and enforcement of Tax Code, Chapter 155.

(2) If the comptroller determines that an existing permit should be suspended or revoked or a permit should be denied, after notice and opportunity for hearing, because the applicant has failed to disclose any information required by Tax Code, §155.041(d), (e), and (f), including the applicant's prior conviction of a crime and the relationship of the crime to the license, the comptroller will notify the applicant or permittee in writing by personal service or by mail of the reasons for the denial, suspension, revocation, or disqualification, the review procedure provided by Occupations Code, §53.052, and the earliest date that the permit holder or applicant may appeal the denial, suspension, revocation, or disqualification.

(g) Sale and delivery of tax-free cigars and tobacco products to the United States government.

(1) Distributors may use their own vehicles to deliver previously invoiced quantities of tax-free cigars and tobacco products to instrumentalities of the United States government. These tax-free products must be packaged in a manner in which they will not commingle with any other cigars or tobacco products.

(2) Each sale of tax-free cigars and tobacco products by a distributor to an instrumentality of the United States government shall be supported by a separate sales invoice and a properly completed federal exemption certificate. Sales invoices must be numbered and dated and must show the name of the seller, name of the purchaser, and the destination.

(h) Reports. All tobacco distributor and manufacturer reports and payments must be filed on or before the last day of each month for transactions that occurred during the preceding month.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 4, 2006.

TRD-200606483
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 475-0387

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SUBCHAPTER BB. BATTERY SALES FEE

34 TAC §3.711

The Comptroller of Public Accounts proposes an amendment to §3.711, concerning collection and reporting requirements. The amendment adds a new (b)(2) to clarify that when a dealer fails to collect the battery sales fee from the purchaser of a lead-acid battery, the comptroller may collect the battery sales fee from the purchaser. Subsequent paragraphs are renumbered accordingly.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the rule is in effect, the rule would benefit the public by specifying the action the comptroller could take should the dealer fail to collect the battery sales fee. This rule is adopted under Tax Code, Title 2, and does not require a statement of fiscal implications for small businesses. There is no significant anticipated economic cost to individuals who are required to comply with the proposed rule.

Comments on the proposal may be submitted to Bryant K. Lomax, Manager, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This amendment is proposed under Tax Code, §111.002 and §111.0022, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2, and taxes, fees, or other charges which the comptroller administers under other law.

The amendment implements Health and Safety Code, §361.138 (l), (m) and (n).

§3.711. Collection and Reporting Requirements.

(a) (No change.)

(b) Collection and remittance of the fee.

(1) Except as provided in subsection (g) of this section, a dealer must collect the fee on each sale of a lead-acid battery. A fee shall not be charged, collected, or allowed as an offset on a battery taken as a trade-in.

(2) If a dealer fails to collect the fee required in paragraph (1) of this subsection, the comptroller may collect the fee from the purchaser.

(3) [~~(2)~~] The fee is not due on the sale of a vehicle, boat, or other equipment that has a battery as an integral part of it.

(4) [~~(3)~~] The amount of the fee due must be separately stated on the invoice, bill, or contract to the customer and shall be identified as the Texas battery sales fee.

(5) [~~(4)~~] A dealer may not advertise, make public, indicate, or imply that the dealer will absorb, assume, or refund any portion of the fee.

(c) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606509
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 475-0387

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 6. TEXAS DEPARTMENT OF CRIMINAL JUSTICE

CHAPTER 151. GENERAL PROVISIONS

37 TAC §151.52

The Texas Board of Criminal Justice proposes an amendment to §151.52, Sick Leave Pool. The proposed revisions are necessary to accurately identify the name of the Agency.

Charles Marsh, Chief Financial Officer for the Texas Department of Criminal Justice, has determined that, for the first five years the rule will be in effect, enforcing or administering the rule will not have foreseeable implications related to costs or revenues for state or local government.

Mr. Marsh has also determined that, for the first five-year period, there will not be an economic impact on persons required to comply with the rule. There will not be an effect on small or micro businesses. The anticipated public benefit, as a result of enforcing the rule, will be to accurately reflect eligibility guidelines for custodial officer certification and hazardous duty pay.

Comments should be directed to Melinda Hoyle Bozarth, General Counsel, Texas Department of Criminal Justice, P. O. Box 13084, Austin, Texas 78711, Melinda.Bozarth@tdcj.state.tx.us. Written comments from the general public should be received within 30 days of the publication of this rule.

The amendments are proposed under Texas Government Code, Chapter 661, Subchapter A.

Cross Reference to Statutes: Texas Government Code, §661.202.

§151.52. Sick Leave Pool.

(a) (No change.)

(b) Procedures.

(1) All contributions to the Texas Department of Criminal Justice (TDCJ) [~~TDCJ~~] sick leave pool are voluntary. Employees who contribute accrued sick leave hours to the TDCJ sick leave pool may not designate the contributed hours for use by a specific employee. An employee who contributes accrued sick leave hours to the sick leave pool may not withdraw the contributed hours of sick leave unless the employee meets the eligibility criteria for sick leave pool withdrawals.

(2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606534
Melinda Hoyle Bozarth
General Counsel
Texas Department of Criminal Justice
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 463-0422

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 7. DADS ADMINISTRATIVE RESPONSIBILITIES

SUBCHAPTER G. COMMUNITY RELATIONS

40 TAC §§7.301 - 7.311, 7.313 - 7.316

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of Subchapter G, consisting of §§7.301 - 7.311 and §§7.313 - 7.316, concerning community relations, in Chapter 7, DADS Administrative Responsibilities.

Background and Purpose

The purpose of the repeal is to facilitate the consolidation of the rules governing volunteer programs associated with, and donations to, DADS in one place in the Texas Administrative Code. HHSC, on behalf of DADS, is proposing a related repeal and new rules in Chapter 61 elsewhere in this issue of the *Texas Register*.

Section-by-Section Summary

The repeal will eliminate obsolete rules governing volunteer programs of the former Texas Department of Mental Health and Mental Retardation. These rules were transferred to DADS' rule base upon the consolidation of health and human services agencies in September 2004. The rules govern volunteer assignments and procedures, donations, fund-raising and solicitation, volunteer services councils (VSCs), the Volunteer Services State Council (VSSC), awards and recognition of volunteer groups, and auditing and reporting guidelines for the VSCs and the VSSC.

The proposed new rules in Chapter 61, governing DADS volunteer programs and donations, incorporate appropriate provisions from these rules that are proposed for repeal.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years after the repeal, there are no foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that the proposed repeal will have no adverse economic effect on small businesses or micro-businesses, or on businesses of any size, because the rules affect voluntary services and donations and do not have any impact on businesses.

Public Benefit and Costs

Penny Steele, director of DADS' Center for Consumer and External Affairs, has determined that, for each year of the first five years after the repeal, the public benefit expected as a result of repealing the sections is that the public will have one place in the Texas Administrative Code to find the rules governing volunteer programs associated with, and donations to, DADS.

Ms. Steele anticipates that there will not be an economic cost to persons who are affected by the repeal. The repeal will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Susan Lish at (512) 438-4213 in DADS' Volunteer and Community Engagement section. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-032, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 032" in the subject line.

Statutory Authority

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeal implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§7.301. Purpose.

§7.302. Application.

§7.303. Definitions.

§7.304. Volunteer Programs.

§7.305. Volunteer Program Procedures.

§7.306. TDMHMR Awards and Recognition of Volunteers and Visiting Groups.

§7.307. Volunteer Services Council (VSC).

§7.308. Fundraising and Solicitation.

§7.309. Donations.

§7.310. Naming of Donations.

§7.311. Volunteer Services State Council (VSSC).

§7.313. Auditing and Reporting Guidelines.

§7.314. Exhibits.

§7.315. References.

§7.316. Distribution.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606543
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 438-4162

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §19.201, concerning criteria for licensing; §19.204, concerning application requirements; §19.209, concerning exclusion from licensure; §19.210, concerning temporary change of ownership; §19.214, concerning criteria for denying a license or renewal of a license; and §19.2106, concerning revocation of a license; and new §19.1919, concerning right to possession; and §19.1925, concerning financial condition, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

Background and Purpose

The purpose of the amendments and new sections is to define financial solvency, minimum standards of financial condition, and a significant change in financial condition to assist DADS in determining the financial viability of a nursing facility. The long-term services industry experienced a rise in bankruptcy filings in the late 1990s. In response, the Texas Legislature granted DADS authority to address financial solvency in Texas Health and Safety Code §242.032(c) and (e) and §242.074, and this statutory language was incorporated into DADS' rule base. However, DADS rules did not define financial solvency, minimum standards of financial condition, or a significant change in financial condition. The proposed amendments and new sections will assist DADS staff to obtain and analyze financial information from nursing facility applicants and license holders and take appropriate licensure actions.

The amendments also replace references to the Texas Department of Human Services (DHS) with references to DADS, update rule cross-references, and update the section name for DADS' licensing section.

Section-by-Section Summary

The amendment to §19.201 removes subsection (j) so that the notification regarding a change in financial condition may be addressed in the new section for minimum standards of financial condition, §19.1925.

The amendment to §19.204 clarifies that an applicant or license holder must provide DADS with any requested information within 30 days of the request.

The amendment to §19.209 adds a provision stating that if a person is excluded from eligibility for a license, the person cannot be a license holder or a controlling person of a license holder during the excluded time period.

The amendment to §19.210 removes the requirement in subsection (g) that an incomplete application must be completed within 30 days after submission to DADS for a temporary change of ownership license.

The amendment to §19.214 adds that DADS may deny an initial license or renewal of a license if the applicant or person required to submit information does not meet the minimum standards of financial condition. The amendment also updates information on hearing procedures, since management of hearings is now the responsibility of HHSC.

New §19.1919 adds that a license holder must maintain the right to possession of the facility as a condition of continued licensure. The new section requires the license holder to notify DADS that the right to possession has been lost or potentially lost by faxing notification that describes the situation within 72 hours after the license holder becomes aware or should have become aware of the loss or potential loss.

New §19.1925 adds that an applicant or license holder must have sufficient financial resources to satisfy obligations at the time they come due and ensure delivery of essential care and services. The license holder must notify DADS of a significant adverse change in financial condition, such as changes to cash flow, results of operation, or other events that could adversely affect the delivery of essential care and services. The license holder must notify DADS by faxing the notice and describing the situation within 72 hours after the license holder becomes aware or should have become aware of the change.

The amendment to §19.2106 updates the reference to the rule requiring a facility to notify DADS of a significant adverse change in financial condition, and updates information on hearing procedures that are now the responsibility of HHSC.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments and new sections are in effect, enforcing or administering the amendments and new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that there may be an adverse economic effect on small businesses or on businesses of any size as a result of enforcing or administering the proposed new sections. There are no nursing facilities that are micro-businesses. The proposed new §19.1925(a) may have a fiscal impact on an applicant and license holder that do not have sufficient financial resources or operating practices to satisfy obligations at the time they come due. These businesses may experience a minimal adverse economic impact due to the cost of obtaining capital funding to satisfy their financial obligations at the time they come due. The applicant and license holder that already satisfy obligations at the time they come due or that are able to utilize their current assets to satisfy obligations at the time they come due will not have an adverse economic effect from proposed new §19.1925(a). The cost of compliance by small businesses is not significantly different than the cost of compliance by the largest businesses because the requirement in §19.1925(a) is based on the financial solvency and liquidity of the business regardless of the size of the business. DADS will not be reducing this financial impact to small businesses because it is important for the health and safety of facility residents that all applicants and license holders meet the minimum standards of financial condition, regardless of the size of the business.

The proposed new §19.1919 may have a minimal fiscal impact on businesses due to the requirement that a license holder fax notice of a loss or imminent loss of the right to possession of the facility. The cost of compliance by small businesses is not significantly different than the cost of compliance by the largest businesses; all businesses, regardless of the size of the business, have to fax the same information.

Public Benefit and Costs

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments and new sections are in effect, the public benefit expected as a result of enforcing the amendments and new sections is that nursing facilities will maintain a higher standard of accountability for financial conditions, which therefore will

strengthen the licensure process. The proposed rules will provide greater protection to the health and safety of residents of nursing facilities by having facilities that are financially solvent.

The proposed new §19.1925(a) may have a fiscal impact on an applicant and license holder that do not have sufficient financial resources or operating practices to satisfy obligations at the time they come due. These applicants and license holders may experience a minimal adverse economic impact due to the cost of obtaining capital funding to satisfy their financial obligations at the time they come due.

The proposed new §19.1919 may have a minimal fiscal impact on license holders due to the requirement to fax notice of a loss or imminent loss of the right to possession of the facility.

The amendments and new sections will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Hannah Ndika at (512) 438-2133 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-019, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, TX 78714-9030 or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 019" in the subject line.

SUBCHAPTER C. NURSING FACILITY LICENSURE APPLICATION PROCESS

40 TAC §§19.201, 19.204, 19.209, 19.210, 19.214

Statutory Authority

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §242.001-242.852.

§19.201. Criteria for Licensing.

(a) A person or governmental unit, acting jointly or severally, must be licensed by DADS [~~the Texas Department of Human Services (DHS)~~] to establish, conduct, or maintain a facility.

(b) An applicant for a license must submit a complete application form and license fee to DADS [~~DHS~~].

(c) (No change.)

(d) In respect to all licenses in effect after December 31, 1999, all services provided under licensure by DADS [~~the Texas Department of Human Services~~] are required, as a condition of licensure, not to constitute a threat to the health and safety of residents as a result of computer software, firmware, or imbedded logic unable to recognize different centuries or more than one century on or after January 1, 2000.

(e) (No change.)

(f) DADS [~~DHS~~] considers the background and qualifications of:

(1) - (4) (No change.)

(g) In making the evaluation required by subsection (f) of this section, DADS [~~DHS~~] requires the applicant or license holder to file a sworn affidavit of a satisfactory compliance history and any other information required by DADS [~~DHS~~] to substantiate a satisfactory compliance history relating to each state or other jurisdiction in which the applicant or license holder and other person described in subsection (f) of this section operated a long-term care facility during the five-year period preceding the date on which the application is made. For purposes of the sworn affidavit of a satisfactory compliance history, the applicant will be considered to have complied with the filing requirement (but not necessarily be entitled to a license) if the applicant swears or affirms that all the information disclosed in the application concerning previous state and federal nursing facility sanctions and penalties and related information are true and correct. The affidavit of compliance history is contained in DADS' [~~DHS's~~] application form.

(h) A license is issued if, after inspection and investigation, DADS [~~DHS~~] finds that the applicant or license holder, and any other person described in subsection (f) [~~(e)~~] of this section, meets all requirements of this chapter. The license is valid for two years. Each license specifies the maximum allowable number of residents. The number of residents authorized by the license must not be exceeded.

(i) In making a determination whether to grant a nursing facility license, DADS [~~DHS~~] reviews:

(1) (No change.)

(2) other documents DADS [~~DHS~~] deems relevant, including survey and complaint investigation findings in each facility the applicant or any other person named in subsection (f) of this section has been affiliated with during the last five years.

[~~(j) As a condition of continued licensure, a facility licensee must notify Facility Enrollment of significant changes in financial position, cash flow, or results of operation that could adversely affect the delivery of essential services, such as nursing or dietary services or utilities. The notification must:~~]

[~~(1) occur as soon as the facility becomes aware of the change in financial condition;~~]

[~~(2) include a description of the specific financial situation; and~~]

[~~(3) be faxed to (512) 438-2730 or (512) 438-3728.~~]

§19.204. Application Requirements.

(a) Applications. All applications must be made on forms prescribed by and available from DADS [the Texas Department of Human Services (DHS)].

(1) Each application must be completed in accordance with DADS [DHS] instructions, and it must be signed and notarized.

(2) Changes to information required in the application must be reported to DADS [DHS], as required by §19.1918 of this title (relating to Disclosure of Ownership).

(b) General information required. An applicant must file with DADS [DHS] an application which contains:

(1) for initial applications and change of ownership only, evidence of the right to possession of the facility at the time the application will be granted, which may be satisfied by the submission of applicable portions of a lease agreement, deed or trust, or appropriate legal document. The names and addresses of any persons or organizations listed as owner of record in the real estate, including the buildings and grounds, must be disclosed to DADS [DHS];

(2) (No change.)

(3) for initial applications and change of ownership only, the certificate of incorporation issued by the secretary of state for a corporation or a copy of the partnership agreement for a partnership; and [,]

(4) for a facility which advertises, markets, or otherwise promotes that it provides services to residents with Alzheimer's disease and related disorders, a disclosure statement, using the departmental form, describing the nature of its care or treatment of residents with Alzheimer's disease and related disorders, as required by the Texas Health and Safety Code, §242.202.

(A) (No change.)

(B) The disclosure statement must contain the following information:

(i) - (ix) (No change.)

(x) the telephone number for DADS' [DHS's] toll-free complaint line.

(C) The disclosure statement must be updated and submitted to DADS [DHS] as needed to reflect changes in special services for residents with Alzheimer's disease or a related condition.

(c) Requested [Additional background] information. An [At the request of DHS, an] applicant or license holder must provide [to the department] any [additional background] information requested by DADS within 30 days of the request.

(d) (No change.)

§19.209. Exclusion from Licensure.

(a) DADS [The Texas Department of Human Services], after providing notice and opportunity for a hearing, may exclude a person from eligibility for a license if the person or any person described in §19.201(f) [§19.201(e)] of this title (relating to Criteria for Licensing) has substantially failed to comply with the rules in this chapter. Exclusion of a person must extend for at least two years, but not more than [that] ten years. During the period of exclusion, the excluded person is not eligible to be a license holder or a controlling person of a license holder.

(b) (No change.)

§19.210. Temporary Change of Ownership.

(a) A temporary change of ownership license is a temporary license issued to an applicant who proposes to become the new operator of a nursing facility that exists on the date the application is filed. Upon receipt of a complete application and fee, DADS [the Texas Department of Human Services (DHS)] issues a temporary license to the prospective new owner if DADS [DHS] finds that the prospective new owner and any other persons listed in §19.201(f) of this title (relating to Criteria for Licensing) meet the requirements in §19.201(e)(2) of this title [(relating to Criteria for Licensing)] and §19.201(g) of this title [(relating to Criteria for Licensing)].

(1) All applications must be made on forms prescribed by and available from DADS [DHS]. Each application must be completed in accordance with DADS [DHS] instructions, signed, and notarized, and must contain all forms required by DADS [DHS].

(2) If an applicant and any other persons listed in §19.201(f) of this title [(relating to Criteria for Licensing)] meet the requirements of §19.201(e)(2) of this title [(relating to Criteria for Licensing)] and §19.201(g) of this title [(relating to Criteria for Licensing)], DADS [DHS] issues or denies a temporary license not later than the 30th day after the date of receipt of the complete application and fee. The effective date of the license is the date requested in the application. However, that date cannot precede the date the application is received in DADS' Licensing and Credentialing Section, Regulatory Services Division [Facility Enrollment].

(3) After DADS [DHS] issues a temporary change of ownership license, an on-site inspection is conducted to verify compliance with the requirements.

(4) If the applicant meets the requirements of §19.201 of this title [(relating to Criteria for Licensing)] and passes an initial inspection or a subsequent inspection before the temporary license expires, a regular two-year license is issued. The effective date of the regular two-year license is the date requested in the application. However, that date cannot precede the date the application is received in DADS' Licensing and Credentialing Section, Regulatory Services Division [Facility Enrollment].

(5) When an applicant has not previously held a license in Texas, a probationary license is issued following the temporary change of ownership license. The effective date of the probationary one-year license is the date requested in the application. However, that date cannot precede the date the application is received in DADS' Licensing and Credentialing Section, Regulatory Services Division [Facility Enrollment].

(6) (No change.)

(b) A nursing facility license holder with an excellent operating record may be eligible to acquire a license on an expedited basis to operate another existing nursing facility. A license holder that appears on the expedited change of ownership list may be granted expedited approval in obtaining a temporary change of ownership license to operate another existing nursing facility in Texas.

(1) DADS [DHS] maintains and keeps current a list of excellent performing nursing facility license holders that operate an institution in Texas and that have excellent operating records, according to the information available to DADS [DHS].

(2) In order to establish and maintain the excellent performing nursing facility license holder list, DADS [DHS] uses the criteria found in §19.2322(e) of this title (relating to Medicaid Bed Allocation Requirements). An excellent performing nursing facility license holder meeting these criteria appears on the list and is eligible for an expedited change of ownership license to operate another existing institution in Texas.

(3) An excellent performing nursing facility license holder appearing on the list must submit an affidavit that demonstrates the license holder continues to meet the criteria established for being listed on the excellent performing nursing facility license holder list, and continues to meet the requirements in §19.201(e)(2) of this title [~~(relating to Criteria for Licensing)~~] and §19.201(g) [~~§19.201(f)~~] of this title [~~(relating to Criteria for Licensing)~~].

(4) DADS [~~DHS~~] issues an expedited change of ownership license to an excellent performing nursing facility license holder on the list if DADS [~~DHS~~] finds that the license holder and any other persons listed in §19.201(f) of this title [~~(relating to Criteria for Licensing)~~] meet the requirements in §19.201(e)(2) of this title and §19.201(g) of this title [~~(relating to Criteria for Licensing)~~].

(5) DADS [~~DHS~~] issues the expedited change of ownership license within 14 working days [~~workdays~~] after submission to DADS' Licensing and Credentialing Section, Regulatory Services Division [~~Facility Enrollment~~] of a complete application, fee, and required affidavit from the applicant.

(6) - (7) (No change.)

(8) If the applicant meets the requirements of §19.201 of this title [~~(relating to Criteria for Licensing)~~] and passes an initial inspection or a subsequent inspection before the temporary license expires, a regular two-year license is issued. The effective date of the regular two-year license is the date requested in the application. However, the date cannot precede the date the application is received in DADS' Licensing and Credentialing Section, Regulatory Services Division [~~Facility Enrollment~~].

(9) (No change.)

(c) During the license term, a license holder may not transfer the license as a part of the sale or other transfer of ownership of the facility. Before [~~Prior to~~] the sale or other transfer of ownership of the facility, the license holder must notify DADS [~~the Texas Department of Human Services (DHS)~~] that a change of ownership is about to take place. A change of ownership is a:

(1) - (3) (No change.)

(d) If a license holder changes its name, but does not undergo a change of ownership, the license holder must notify DADS [~~DHS~~] and submit a copy of a certificate of amendment from the Secretary of State's office. On receipt of the certificate of amendment, the current license will be re-issued in the license holder's new name.

(e) To avoid a gap in the license because of a change in ownership of the facility, the prospective new owner must submit to DADS [~~DHS~~] a complete application for a temporary change of ownership license under §19.201 of this title [~~(relating to Criteria for Licensing)~~] at least 30 days before the anticipated date of sale or other transfer of ownership. If the applicant has filed a timely and sufficient application for a temporary change of ownership license and otherwise meets all requirements for a license, DADS issues [~~DHS will issue~~] the applicant a temporary change of ownership license effective on the date requested by the applicant on the completed application. DADS [~~DHS~~] considers an individual has filed a timely and sufficient application for a temporary change of ownership license if the individual submits:

(1) a complete application to DADS [~~DHS~~], and DADS [~~DHS~~] receives the complete application at least 30 days before the anticipated date of sale or other transfer of ownership;

(2) an incomplete application to DADS [~~DHS~~] with a letter explaining the circumstances that prevented the inclusion of the missing information, and DADS [~~DHS~~] receives the incomplete application and letter at least 30 days before the anticipated date of sale or other transfer of ownership;

(3) a complete application to DADS [~~DHS~~], DADS [~~DHS~~] receives the application during the 30-day period ending on the anticipated date of sale or other transfer of ownership, and the individual pays a $500 administrative penalty; or

(4) an application to DADS [~~DHS~~], DADS [~~DHS~~] receives the application by the date of sale or other transfer of ownership, and the individual proves to DADS' [~~DHS's~~] satisfaction that the health and safety of the facility residents required an emergency change of ownership.

(f) If the application is postmarked by the filing deadline, the application will be considered to be timely filed if received in DADS' Licensing and Credentialing Section, Regulatory Services Division [~~the Facility Enrollment Section of the state office of Long-Term Care-Regulatory, Texas Department of Human Services,~~] within 15 days after the date of the postmark.

[~~(g) DHS considers an individual has filed a timely and sufficient application for a temporary change of ownership license if the individual submits a complete application within 30 days after submission of an incomplete application. An application must be complete within 30 days after submission to Facility Enrollment. DHS denies an application that remains incomplete 30 days after the date an incomplete application is submitted to Facility Enrollment.~~]

§19.214. Criteria for Denying a License or Renewal of a License.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] may deny an initial license or refuse to renew a license if an applicant, or any person required to submit background and qualification information:

(1) does not have a satisfactory history of compliance with state and federal nursing home regulations. In determining whether there is a history of satisfactory compliance with federal or state regulations, DADS [~~DHS~~] at a minimum may consider:

(A) - (E) (No change.)

(F) the number of violations relative to the number of facilities the applicant or any other person named in §19.201(f) [~~§19.201(e)~~] of this title (relating to Criteria for Licensing) has been affiliated with during the last five years; and

(G) any exculpatory information deemed relevant by DADS [~~DHS~~];

(2) - (6) (No change.)

(7) discloses any of the following actions within the five-year period preceding the application:

(A) - (E) (No change.)

(F) suspension of a license to operate a health care facility, long-term care facility, assisted living [~~personal care~~] facility, or a similar facility in any state;

(G) - (H) (No change.)

(I) expiration of a license while a revocation action is pending and the license is surrendered without an appeal of the revocation or an appeal is withdrawn;[~~.~~]

(8) fails to meet minimum standards of financial condition as described in §19.201(e)(2)(A) of this title and §19.1925(a) of this title (relating to Financial Condition); or [~~notify DHS of a significant change in financial conditions, as required under §19.201(j) of this title (relating to Criteria for Licensing).~~]

(9) fails to notify DADS of a significant adverse change in financial condition as required under §19.1925(b) of this title.

(b) DADS does [~~DHS will~~] not issue a license to an applicant to operate a new facility if the applicant discloses any of the following actions during the five-year period preceding the application:

(1) revocation of a license to operate a health care facility, long-term care facility, assisted living [~~personal care~~] facility, or similar facility in any state;

(2) - (5) (No change.)

(c) - (d) (No change.)

(e) If DADS [~~DHS~~] denies a license or refuses to issue a renewal of a license, the applicant or license holder [~~licensee~~] may request an administrative hearing. Administrative hearings are held under the Health and Human Services Commission's formal hearing procedures in 1 TAC, Chapter 357, Subchapter I [~~provisions of the Administrative Procedures Act (APA), Title 10 of the Texas Government Code, §§2001.051 et seq, and DHS's formal hearing rules in §§79.1601 - 79.1614 of this title (relating to Formal Hearings)~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4162

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SUBCHAPTER T. ADMINISTRATION

40 TAC §19.1919, §19.1925

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The new sections implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§242.001-242.852.

§19.1919. Right to Possession.

(a) As a condition of continued licensure, a license holder must maintain the right to possession of the facility as described in §19.204(b)(1) of this title (relating to Application Requirements).

(b) The license holder must notify DADS in writing within 72 hours after the license holder becomes aware of or should have become aware of the loss and imminent loss of the right to possession of the facility, such as notice of eviction, foreclosure, termination of lease, or similar proposed action. The notification must:

(1) include a description of the specific situation that resulted in loss of possession of the facility;

(2) be faxed to (512) 438-2730 or (512) 438-2728; and

(3) be kept on file with a copy of the fax confirmation.

§19.1925. Financial Condition.

(a) Effective April 1, 2008, minimum standards of financial condition require the applicant or license holder to have sufficient financial resources to:

(1) satisfy obligations at the time they come due; and

(2) ensure at all times the delivery of essential care and services, such as nursing or dietary services, or utilities.

(b) A license holder must notify DADS of significant adverse changes in financial condition, which include changes in financial position, cash flow, results of operation, or other events that could adversely affect the delivery of essential care and services, such as nursing or dietary services, or utilities. The following are examples of significant adverse changes in financial condition that must be reported:

(1) The license holder, operator, administrator, or manager receives notice that a judgment or tax lien has been levied against the facility or any of the assets of the facility or the license holder.

(2) A financial institution refuses to honor a facility-operation-related check or other financial instrument issued by the license holder, operator, administrator, or manager or agent of the license holder, operator, administrator, or manager.

(3) The quantity of supplies, including nursing, dietary, pharmaceutical, or other care and service supplies, becomes insufficient to meet the immediate needs of the residents.

(4) The license holder, operator, administrator, or manager fails to make timely payments of any facility-related tax.

(5) A voluntary or involuntary bankruptcy petition under the United States Code or any other laws of the United States is filed by the license holder or any other controlling persons as defined in Texas Health and Safety Code §242.0021.

(6) A court appoints a bankruptcy trustee for the facility.

(7) A person seeking appointment of a receiver for the facility files a petition in any jurisdiction.

(8) The license holder, operator, administrator, or manager is unable to meet conditions of a facility-operation-related loan or debt covenant unless the loan or debt covenant has been waived.

(9) The license holder, operator, administrator, or manager receives notice of intent to litigate in relation to the facility or its operations.

(10) The license holder, operator, administrator, or manager is unable to meet facility-operation-related contractual obligations or vendor contracts.

(c) The license holder must notify DADS in writing of a significant adverse change in its financial condition as required by subsection (b) of this section within 72 hours after the license holder becomes aware of or should have become aware of the change.

(d) The license holder's notice required by subsection (b) of this section must include a description of:

(1) the specific significant adverse change in financial condition;

(2) how the significant adverse change in financial condition affects the license holder's ability to deliver essential care and services; and

(3) the actions the license holder has taken to address the significant adverse change in financial condition.

(e) The license holder must fax the notice required in subsection (b) of this section to (512) 438-2730 or (512) 438-2728, and the notice must be kept on file with a copy of the fax confirmation.

(f) The license holder may be required to provide additional financial information at DADS' request.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER V. ENFORCEMENT
DIVISION 2. LICENSING REMEDIES

40 TAC §19.2106

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 242, which authorizes DADS to license and regulate nursing facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §242.001-242.852.

§19.2106. Revocation of a License.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] may revoke a facility's license when the license holder, or any other person described in §19.201(f) of this title (relating to Criteria for Licensing), has:

(1) - (2) (No change.)

(3) failed to notify DADS [~~DHS~~] of a significant adverse change in financial conditions, as required under §19.1925(b) [~~§19.201(j)~~] of this title (relating to Financial Condition [~~Criteria for Licensing~~]).

(b) Revocation of a license may occur simultaneously with any other enforcement provision available to DADS [~~DHS~~].

(c) The license holder will be notified by certified mail of DADS' [~~DHS's~~] intent to revoke the license, including the facts or conduct alleged to warrant the revocation, with a copy being sent to the facility. The license holder has an opportunity to show compliance with all requirements of law for the retention of the license as provided in §19.215 of this title (relating to Opportunity to Show Compliance [~~Informal Reconsideration~~]). If the license holder requests an informal reconsideration, DADS gives [~~DHS will give~~] the license holder a written affirmation or reversal of the proposed action.

(d) The license holder will be notified by certified mail of DADS' [~~DHS's~~] revocation of the facility's license, with a copy being sent to the facility. The license holder has 15 days from receipt of the certified mail notice to request a hearing in accordance with the Health and Human Services Commission's formal hearing procedures in 1 TAC, Chapter 357, Subchapter I [~~Chapter 79, Subchapter Q of this title (relating to Formal Appeals)~~]. The revocation will take effect when the deadline for appeal of the revocation passes, unless the license holder appeals the revocation. If the license holder appeals the revocation, the status of the license holder is preserved until final disposition of the contested matter. Upon revocation, the license must be returned to DADS [~~DHS~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. RESIDENT RIGHTS

40 TAC §19.419

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §19.419, concerning advance directives, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

Background and Purpose

The purpose of the amendment is to comply with Senate Bill 1188, 79th Texas Legislature, Regular Session, 2005, which added §531.083 to the Texas Government Code. Section 531.083 requires HHSC to ensure that all Medicaid recipients who reside in a nursing facility are provided information about end-of-life care options and the importance of planning for end-of-life care. HHSC delegated this responsibility to DADS, and DADS staff convened a workgroup to develop educational material related to advance care planning for use by nursing facilities. The proposed amendment will provide HHSC a means to ensure that it meets the statutory mandate, as DADS will require a nursing facility to provide the educational material related to advance care planning to a resident, or other appro-

priate person as described in the rule, and to document in the resident's clinical record that the material was provided.

Section-by-Section Summary

The amendment to §19.419 adds language to require a nursing facility to: (1) give each resident, or other appropriate person as described in the rule, a copy of the DADS advance care planning educational material when the resident is admitted to the nursing facility; (2) orally review and discuss the educational material and the importance of planning for end-of-life care with the resident, or other appropriate person, within 14 days after the resident is admitted; and (3) provide, review, and discuss required information regarding advance directives with the resident, or other appropriate person, annually and when there is a significant change in the resident's clinical condition. The facility must document the oral discussion and the provision of required information in the resident's clinical record and, if applicable, must also document its attempts to make a diligent search for an appropriate person with whom to provide, review, and discuss the required information regarding advance directives.

The amendment also: (1) revises the title of the section; (2) provides a cross-reference in subsection (a) to the meaning of the term "advance directive" as it is defined in the Texas Health and Safety Code; (3) ensures consistency in use of the terms "resident" and "facility;" (4) adds language in subsection (b)(7) to require the facility to provide emergency medical technicians and hospital personnel with any information relating to a resident's advance directive; and (5) in subsection (c), clarifies that the automatic administrative penalty of $500 applies only to the failure to provide the facility's written policies as required in §19.419(b)(2)(A)(iii).

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses, or on businesses of any size as a result of enforcing or administering the amendment, because DADS is providing the required advance care planning educational material at no cost to the nursing facilities through the DADS website.

Public Benefit and Costs

Don Henderson, director of DADS' Center for Policy and Innovation, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that residents of nursing facilities will have increased opportunities for awareness and information regarding advance directives and the importance of making their own decisions about end-of-life care.

Mr. Henderson anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Geri Willems at (512) 438-3159 in DADS' Center for Policy and Innovation. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-054, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, TX 78714-9030 or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 054" in the subject line.

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Government Code, §531.083, which requires HHSC to ensure that all Medicaid recipients who reside in a nursing facility in Texas are provided information about end-of-life care options and the importance of planning for end-of-life care.

The amendment affects Texas Government Code, §§531.0055, 531.021, and 531.083 and Texas Human Resources Code, §161.021.

§19.419. Advance Directives [~~and Medical Powers of Attorney~~].

(a) Competent adults may issue advance directives in accordance with applicable laws. An advance directive has the meaning as defined in Texas Health and Safety Code, §166.002.

(b) A [~~The nursing~~] facility must maintain policies and procedures implementing [~~regarding~~] the following [~~rules~~] with respect to all adult residents [~~individuals receiving services provided by the facility~~]:

(1) The [~~the~~] facility must:

(A) maintain written policies regarding the implementation of advance directives; and [~~.~~]

(B) [~~The policies must~~] include a clear and precise statement of any procedure the facility is unwilling or unable to provide or withhold in accordance with an advance directive. [~~:~~]

(2) The facility must:

(A) when a resident is admitted, provide the resident or the appropriate person referenced in paragraph (8) of this subsection

[~~upon admission, all individuals must be provided~~] with a copy of [~~the following written information~~]:

(i) the advance care planning educational material provided by DADS;

(ii) [~~(A)~~] the resident's [~~individual's~~] rights under Texas law (whether statutory or as recognized by the courts of the state) to make decisions concerning medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives; and

(iii) [~~(B)~~] the [~~nursing~~] facility's policies respecting the implementation of these rights, including the written policies regarding the implementation of advance directives;

(B) within 14 days after the resident is admitted, orally review and discuss the information provided in accordance with subparagraph (A) of this paragraph and the importance of planning for end-of-life care with the resident or with the appropriate person referenced in paragraph (8) of this subsection; and

(C) annually and when there is a significant positive change or a significant deterioration in the resident's clinical condition, provide, review, and discuss the written information regarding advance directives listed in subparagraph (A) of this paragraph with the resident or with the appropriate person referenced in paragraph (8) of this subsection.

(3) The facility must document the oral discussion and the provision of the written information in the resident's clinical record. The [~~the nursing~~] facility must document in the resident's clinical record whether or not the resident [~~individual~~] has executed an advance directive. [~~;~~]

(4) The [~~the nursing~~] facility must not condition the provision of care or otherwise discriminate against a resident [~~an individual~~] based on whether or not the resident [~~individual~~] has executed an advance directive. [~~;~~]

(5) The [~~the~~] facility must ensure compliance with the requirements of Texas law, whether statutory or as recognized by the courts of Texas, respecting advance directives. [~~;~~]

(6) The [~~the~~] facility must provide, individually or with others, [~~for~~] education for staff and the community on issues concerning advance directives. For the community, this may include [~~, but is not limited to,~~] newsletters, newspaper articles [~~in the newspaper~~], local news reports, or commercials. For educating staff, this may include [~~, but is not limited to,~~] in-service programs. [~~;~~]

(7) The [~~the~~] facility must provide the attending physician, emergency medical technician, and hospital personnel with any information relating to a resident's known existing advance directive [~~Directive to Physicians and/or Living Will or Medical Power of Attorney,~~] and assist with coordinating physicians' orders with the resident's known existing advance [~~any resident~~] directive.[~~;~~]

(8) Except as provided in paragraph (9) of this subsection, if a resident [~~when an individual~~] is in a comatose or otherwise incapacitated state, and therefore is unable to receive information or articulate whether the resident [~~he~~] has executed an advance directive, the facility [~~:~~]

[~~(A)~~] must provide, review, and discuss written information regarding advance directives, including advance care planning educational material provided by DADS and facility policies regarding the implementation of advance directives, [~~must be provided~~] in the following order of preference, to:

(A) [~~(i)~~] the resident's legal guardian;

(B) [~~(ii)~~] a person responsible for the resident's health care decisions;

(C) [~~(iii)~~] the resident's spouse;

(D) [~~(iv)~~] the resident's adult child;

(E) [~~(v)~~] the resident's parents; or

(F) [~~(vi)~~] the person admitting the resident.

(9) [~~(B)~~] If a resident is in a comatose or otherwise incapacitated state, and therefore is unable to receive information or articulate whether the resident has executed an advance directive, and if the facility is unable, after diligent search, to locate a person [~~an individual~~] listed under paragraph (8) of this subsection [~~subparagraph (A) of this paragraph~~], the facility is not required to provide written information regarding advance directives. The facility must document in the resident's clinical record its attempts to make a diligent search. [~~give notice;~~]

(10) [~~(9)~~] If [~~if~~] a resident, who was incompetent or otherwise incapacitated and was unable to receive information regarding advance directives, including written policies regarding the implementation of advance directives, later becomes able to receive the information, the facility must provide, review, and discuss the written information at the time the resident [~~individual~~] becomes able to receive the information. [~~; and~~]

(11) [~~(10)~~] If [~~when~~] the resident or a relative, surrogate, or other concerned or related person [~~individual~~] presents the facility with a copy of the resident's [~~individual's~~] advance directive, the facility must comply with the advance directive, including recognition of a Medical Power of Attorney, to the extent allowed under state law. If no one comes forward with a previously executed advance directive and the resident is incapacitated or otherwise unable to receive information or articulate whether he has executed an advance directive, the facility must document in the resident's clinical record [~~note~~] that the resident [~~individual~~] was not able to receive information and was unable to communicate whether an advance directive existed.

(c) Failure to provide the facility's written policies as required in subsection (b)(2)(A)(iii) of this section when a resident is admitted [~~inform the resident of facility policies regarding the implementation of advance directives~~] will result in an administrative penalty of $500.

(d) A facility that provides [~~Nursing facilities that provide~~] services to children must ensure that:

(1) prior to admission to the facility, the primary physician, who has been providing care to the child, has discussed advance directives with the family or guardian and has provided documentation of [~~documented~~] this discussion to the facility; and

(2) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
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Department of Aging and Disability Services
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SUBCHAPTER X. REQUIREMENTS FOR MEDICAID-CERTIFIED FACILITIES

40 TAC §19.2308

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §19.2308, concerning change of ownership, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

Background and Purpose

The purpose of the amendment is to set forth conditions under which DADS may waive placing holds on vendor payments to a nursing facility's prior owner for a change of ownership in which the prior owner and new owner are substantially the same entities. The proposed amendment will establish in rule the procedures that are currently practiced with a successor liability agreement, which a nursing facility may complete when a change of ownership occurs. The proposed amendment will allow payments to continue to be made to owners that submit sufficient information to verify that the prior owner and new owner are substantially the same entities and, therefore, minimize disruption of facility operations.

Section-by-Section Summary

The amendment to §19.2308 adds the conditions that a nursing facility must follow in order for DADS to waive placing holds on vendor payments to a prior owner for a change of ownership. The nursing facility must: (1) notify DADS at least 60 days before the effective date of the change of ownership, (2) provide DADS with a signed and notarized contract application, and (3) provide DADS with sufficient information in order for DADS to verify that the ownership structure is substantially the same. The amendment requires the new owner and prior owner to complete a successor liability agreement under which the new owner agrees to pay for any liabilities that exist or may be found to exist during the prior owner's contract. If the 60-day time frame is not met, the change of ownership may result in a hold of the vendor payments until the conditions of the rule are met.

The amendment reorganizes the section to better clarify the process for a change of ownership; and throughout the section, references to the Texas Department of Human Services (DHS) are replaced with references to DADS.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses or on businesses of any size as a result of enforcing or administering the amendment, because money that is due to DADS will be paid by the new owners for any liabilities that exist or may be found to exist for the prior owner's contract.

Public Benefit and Costs

Barry Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is the residents of a nursing facility will have minimal interruption of facility operations when a change of ownership involves facility owners that are substantially the same entities.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Owen Wheeler at (512) 438-4385 in DADS' Institutional Services Policy Development and Support Unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-059, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, TX 78714-9030 or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 059" in the subject line.

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021; and Texas Human Resources Code, §161.021.

§19.2308. Change of Ownership.

(a) Definition. An ownership change is defined in §19.210(c) of this title (relating to Temporary Change of Ownership). For purposes of this section, prior owner is defined as the legal entity with a Medicaid contract for [~~licensed to operate~~] the facility before the change of ownership. The new owner is the legal entity to which DADS has assigned the contract (in accordance with 42 CFR §442.14 and subsection (d) of this section). The effective date of the ownership change is the effective date of the new owner's license for the facility. [~~licensed to operate the facility after the change. The Texas Department of Hu-~~

man Services (DHS) will recognize the ownership change subject to the following conditions:]

(b) [(1)] Notice of ownership change. The prior owner must give DADS [DHS will recognize an ownership change effective as the date of transfer of ownership agreed to between the prior owner and the new owner (agreed change date) if DHS receives] written notice of a [the] change of ownership at least 30 days before the effective date of the [temporary] change [of ownership date]. If written notice of the change is not received 30 days before the agreed change date, DADS [DHS] is not responsible for payments made to the prior owner or new owner that do not reflect the established change date. DADS [DHS] will not make a duplicate payment. It is the responsibility of the prior and new owner to make arrangements between themselves for such contingencies.

(c) Vendor holds based on a change of ownership.

(1) Holds on payments due to a prior owner.

(A) [(2)] When DADS [DHS] receives information about a proposed or actual change of ownership, DADS [DHS] may place vendor payments to the prior owner on hold. Vendor payments will not be released until the Texas Health and Human Services Commission notifies DADS that the prior owner meets the final reporting requirements as specified in 1 TAC §355.306 (relating to Cost Finding Methodology) and 1 TAC §355.308(f)(1)(A) (relating to Direct Care Staff Rate Component). [until all of the following conditions are met:]

(B) Once the final reporting requirements in subparagraph (A) of this paragraph are met, vendor payments may still be held so that money owed to DADS can be recouped from the funds placed on hold. Vendor payments will be released after:

(i) [(A)] completion of a billing and claims reconciliation, or the passing of a time period of 12 months after the effective date of the change of ownership [up to 12 months after submittal of the final bill], whichever is sooner[. Money owed to DHS will be recouped from the funds placed on hold]; or

[(B) DHS receives information sufficient to verify the ownership change, if DHS requests such information;]

[(C) the prior owner meets the final reporting requirements as specified in Title 1, Texas Administrative Code (TAC), §355.306 (relating to Cost Finding Methodology) and 1 TAC §355.308(f)(1)(A) (relating to Enhanced Direct Care Staff Rate); and]

(ii) [(D)] the prior owner provides, at DADS' [DHS's] option, either [one] of the following documents in a format acceptable to DADS [DHS] to cover possible liabilities of the prior owner:

(I) [(i)] a surety bond or an irrevocable letter of credit as described in §19.2312 of this title (relating to Surety Bonds or Letters of Credit); or

[(ii) the new owner's nontransferable written agreement that the new owner has agreed to pay DHS for any liabilities that exist or may be found to exist during the period of the prior owner's contract with DHS; or]

(II) [(iii)] written authority by the prior owner to withhold and retain funds normally due the prior owner from other Medicaid contracts the prior owner may have with DADS [DHS].

(2) Waiving holds on payments due to a prior owner.

(A) DADS may waive placing vendor payments to the prior owner on hold, if, at least 60 days before the effective date of the change of ownership:

(i) the prior owner notifies DADS of the change of ownership;

(ii) the new owner provides DADS with a signed and notarized contract application;

(iii) DADS receives information sufficient to verify that the ownership change is a reorganization of the prior owner's ownership structure and that the new owner's ownership structure:

(I) consists of individuals who owned at least 51% of the ownership in the prior owner and own at least 51% of the ownership in the new owner;

(II) does not consist of a change in a general partner, if the prior owner's ownership structure was a limited partnership; and

(III) retains control of the prior owner's financial records; and

(iv) the prior owner returns to DADS the nontransferable DADS Successor Liability Agreement (provided by DADS) signed by the prior and new owners indicating that the new owner has agreed to pay DADS for any liabilities that exist or may be found to exist during the period of the prior owner's contract with DADS.

(B) Meeting the conditions in subparagraph (A) of this paragraph but not meeting the 60-day time frame may result in DADS placing vendor payments to the prior owner on hold; however, once all of the conditions listed in subparagraph (A) of this paragraph are met, the hold will be released.

(3) Holds on payment due to the new owner.

(A) [(3)] During the period between the issuance of the temporary change of ownership license and the inspection or survey of the nursing facility, DADS [DHS] may not place a hold on vendor payments to the temporary license holder.

(B) [(4)] If the nursing facility fails to pass the inspection or survey or fails to meet the requirements in §19.201 of this title (relating to Criteria for Licensing), DADS [DHS] may place a hold on vendor payments to the new owner [temporary license holder].

(d) [(5)] Contract assignment. When a change in ownership occurs, DADS automatically [DHS] assigns the agreement to the new owner by issuing a new contract [to the new owner effective on the later of: the agreed change date; the date DHS received written notice of the change; or the date necessary to avoid double payments]. By signing the contract, the new owner is representing to DADS [DHS] that the new owner meets the requirements of the contract and the requirements for participation in the Medicaid program. The new owner's contract is subject to the prior owner's contract terms and conditions that were in effect at the time of transfer of ownership, including[, but not limited to,] the following:

(1) [(A)] any plan of correction;

(2) [(B)] compliance with health and safety standards;

(3) [(C)] compliance with the ownership and financial interest disclosure requirements of 42 CFR [Code of Federal Regulations,] §§455.104, 455.105, and 1002.3;

(4) [(D)] compliance with civil rights requirements in 45 CFR [Code of Federal Regulations,] Parts 80, 84, and 90;

(5) [(E)] compliance with additional requirements imposed by DADS [DHS]; and

(6) [(F)] any sanctions as specified in this chapter relating to remedies for violations of Title XIX nursing facility provider agree-

ments, including deficiencies, vendor holds, compliance periods, accountability periods, monetary penalties, notification for correction of contract violations, probationary contracts, and history of deficiencies.

(e) [~~(6)~~] Medical assistance payments nontransferable. Neither medical assistance nor amounts payable to vendors out of public assistance funds are transferable or assignable at law or in equity. DADS [~~DHS~~] will not allow non-split agreements in the case of ownership changes. Non-split agreements [~~arrangements~~] are arrangements where DADS [~~DHS~~] does not interrupt payments to prior [~~old~~] and new owners but continues reimbursements as though no ownership change has occurred. A split in pay agreement ensures that payments to the prior owner stop on a certain date and payments for services thereafter go to the new owner.

(f) [~~(7)~~] Owner agreements. The new owner and the prior owner of a nursing facility may reach any agreement they wish, but DADS [~~DHS~~] will not participate in a non-split procedure which would allow the new owner to receive the prior owner's accrued vendor payments.

(g) [~~(8)~~] Financial records. The prior owner of the facility may remove the financial records pertaining to his period of ownership from the facility, but must maintain them for the time period prescribed by law or until such time as all audit exceptions are reconciled, whichever period is the longer. The original copies of the trust fund records, including ledger cards, may be removed by the prior owner if an exact duplicate of the trust fund records, including ledger cards, remains with the new owner.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200606546
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 438-4162

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CHAPTER 61. COMMUNITY SERVICES--VOLUNTEER SERVICES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), the repeal of §§61.1 - 61.16 and simultaneously proposes new §§61.101 - 61.107, concerning volunteers and donations, in Chapter 61. The name of Chapter 61 is being changed from Community Services--Volunteer Services to Volunteer and Community Engagement.

Background and Purpose

The purpose of the repeal and new sections is to facilitate consolidation of the rules governing volunteer programs associated with, and donations to, DADS in one place in the Texas Administrative Code. The new sections are proposed to reflect new procedures and organizational structures resulting from the consolidation of health and human services agencies in compliance with Acts 2003, 78th Legislature, Regular Session, Chapter 198 (House Bill 2292). The new sections are also proposed to comply with Texas Government Code, Chapter 2255, concerning the relationship of a state agency to a private donor or a private organization; and with Texas Government Code, Chapter 2109, which governs volunteer programs in a state agency. The repeal will eliminate obsolete rules of the former Texas Department of Human Services that were transferred to DADS in September 2004 and govern volunteer requirements, including volunteer selection, responsibilities, supervision, and recognition.

HHSC, on behalf of DADS, is also proposing the repeal of rules governing volunteers in Chapter 7, Subchapter G, elsewhere in this issue of the *Texas Register*.

Section-by-Section Summary

The proposed new sections: (1) confirm the value DADS places on volunteers and donors, including their services and donations that support DADS programs; and (2) govern the relationship between DADS (and its employees) and volunteers, private donors, and private organizations. In particular, the proposed new sections govern the relationship between DADS and the volunteer services councils (VSCs) and between DADS and the Volunteer Services State Council (VSSC). The VSC and VSSC are nonprofit organizations that provide support to consumers of DADS services in state schools and state centers.

Proposed new §§61.101 - 61.103 provide the purpose and application of the chapter, and define the words and terms used in the chapter. Proposed new §61.104 confirms the value DADS places on volunteers. Proposed new §61.105: (1) requires a private donor to report to DADS any contracts or licenses the private donor has with DADS; (2) states that DADS will not accept a donation from a private donor that has a DADS employee as a director or officer, unless otherwise noted in the rules; and (3) prohibits a DADS employee from accepting a personal gift from or employment by a private donor.

Proposed new §61.106 governs the relationship of the VSCs and the VSSC to DADS and employees of DADS. The proposed new section governs fiscal responsibilities and duties of the VSC and VSSC, including allowable and unallowable uses of funds generated by the organizations. It also describes acceptable ways in which DADS can support the VSC and the VSSC.

Proposed new §61.107 requires DADS volunteers and partners to abide by all applicable rules, policies, and procedures and gives the public a means for obtaining additional, more specific information about policies and procedures for DADS volunteer programs and for making donations.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed repeal and new sections are in effect, enforcing or administering the repeal and new sections does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses or on businesses of any size as a result of enforcing or administering the repeal and new sections, because the rules affect voluntary services and donations and do not pose any new requirements on businesses.

Public Benefit and Costs

Penny Steele, director of DADS' Center for Consumer and External Affairs, has determined that, for each year of the first five

years the repeal and new sections are in effect, the public benefit expected as a result of enforcing the repeal and new sections is that the public will find rules governing DADS' volunteer and community engagement programs in one location in the Texas Administrative Code.

Ms. Steele anticipates that there will not be an economic cost to persons who are required to comply with the repeal and new sections. The repeal and new sections will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Susan Lish at (512) 438-4213 in DADS' Volunteer and Community Engagement section. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-032, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, Texas 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 032" in the subject line.

40 TAC §§61.1 - 61.16

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

Statutory Authority

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; and Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS.

The repeal implements Texas Government Code, §531.0055, and Texas Human Resources Code, §161.021.

§61.1. What is the purpose of this chapter?

§61.2. What do the words and terms used in this chapter mean?

§61.3. How are volunteers selected?

§61.4. What kinds of service do volunteers provide?

§61.5. What does DHS expect of its volunteers?

§61.6. What are the requirements for volunteers transporting clients?

§61.7. What are the requirements for volunteers providing direct help to clients?

§61.8. What kind of identification is required for volunteers?

§61.9. What support do volunteers receive?

§61.10. Must volunteers receive training?

§61.11. Who supervises volunteers?

§61.12. Are volunteers reimbursed for their expenses?

§61.13. What are considered reimbursable expenses?

§61.14. What requirements concerning volunteers are specific to Title XIX clients?

§61.15. Are volunteers covered by insurance?

§61.16. Does DHS recognize its volunteers for their service?

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2006.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4162

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CHAPTER 61. VOLUNTEER AND COMMUNITY ENGAGEMENT

40 TAC §§61.101 - 61.107

Statutory Authority

The new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §2109.003, which requires each state agency to develop a volunteer program; and Texas Government Code, §2255.001, which requires a state agency that is authorized by statute to accept money from a private donor, or for which a private organization exists that is designed to further the purposes and duties of the agency, to adopt rules governing the relationship between the donor or organization, and between the agency and its employees.

The new sections implement Texas Government Code, §§531.0055, 2109.003, and 2255.001; and Texas Human Resources Code, §161.021.

§61.101. Purpose.

The purpose of this chapter is to establish standards for volunteer programs associated with, and donations to, the Department of Aging and Disability Services.

§61.102. Application.

This chapter applies to all volunteer programs associated with, and donations to, the Department of Aging and Disability Services.

§61.103. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) 501(c)(3) organization--An organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code.

(2) Community relations director--The employee responsible for coordinating a state school's or state center's community relations functions, volunteer programs, fund-raising, and donations.

(3) Consumer--A person receiving a DADS service.

(4) DADS--The Department of Aging and Disability Services.

(5) Donation--A contribution of anything of value (for example, funds or in-kind goods and services) freely given to DADS or a private organization.

(6) Employee--An individual who is legally employed to perform work and who is paid a salary or wage by DADS.

(7) Private donor--A person or private organization that makes a donation to DADS or to a private organization.

(8) Private organization--An organization created and operated to further the purposes and duties of DADS.

(9) Volunteer--An individual who provides time, personal attention, or services to consumers, DADS, a facility, or a VSC without payment. Volunteers may include:

(A) community citizens;

(B) family members of consumers when not acting on behalf of the consumer;

(C) employees when not performing the same types of services they perform as employees;

(D) consumers when not acting solely on behalf of themselves; and

(E) community restitution volunteers who are required by a court to provide a specified number of hours of volunteer services.

(10) Volunteer and Community Engagement--The DADS division responsible for promoting individual and community awareness and involvement in volunteerism, community collaborations, and partnerships.

(11) VSC (Volunteer Services Council)--A 501(c)(3) organization that is formed to generate resources on behalf of a state school or state center.

(12) VSSC (Volunteer Services State Council)--A 501(c)(3) statewide service organization that assists member volunteer groups to provide fund-raising support to state schools, state hospitals, and community mental health and mental retardation centers.

§61.104. Volunteers.

DADS values volunteers for their efforts to provide goods, services, personal attention, and relationships that enhance and enrich the lives of consumers.

§61.105. Relationship of Private Donors to DADS and Employees of DADS.

(a) Before making a donation to DADS, a private donor must report to the manager of Volunteer and Community Engagement any contracts or licenses the private donor has with DADS.

(b) DADS may not accept a donation from a private donor that has an employee of DADS as a director or officer, except as otherwise provided in this chapter.

(c) No employee of DADS may solicit or accept a personal gift of money or any other thing of value from a private donor. A personal gift is a gift to the employee as an individual.

(d) No employee of DADS may be employed by a private donor without approval from DADS.

(e) Except as otherwise provided in this chapter, a private donor must not use an employee of DADS or DADS property except under a contract with DADS regarding the use of the employee or property.

§61.106. Relationship of Private Organizations to DADS and Employees of DADS.

(a) Volunteer Services Councils.

(1) The state school or state center superintendent and community relations director are nonvoting members of the VSC board and executive committee.

(2) The community relations director may make expenditures of up to $300 on behalf of the VSC for the benefit of consumers.

(3) The community relations department may process and issue receipts for donations to the VSC.

(4) No employee may sign a VSC check or use a VSC debit or credit card.

(5) The community relations department may maintain a VSC petty cash fund of up to $300 to be used for the benefit of consumers.

(A) The community relations director must appoint a primary and alternate custodian for the VSC petty cash fund.

(B) The primary custodian of the petty cash fund is responsible for maintaining receipts and accurate documentation of all funds disbursed and for furnishing this documentation to the treasurer of the VSC.

(C) An officer of the VSC, or an employee outside of the community relations department, must reconcile the petty cash fund at least once every two months.

(6) DADS may provide the following items of support for the VSC:

(A) office space;

(B) fund-raising assistance;

(C) annual training for volunteers, board members, and officers;

(D) clerical and administrative services; and

(E) assistance in the coordination of activities.

(7) Funds generated by the VSC may be used only for:

(A) the needs of consumers;

(B) the enhancement of state school or state center operations;

(C) recognition and education projects;

(D) new initiatives that improve the quality of life for consumers; and

(E) other legitimate expenses.

(8) Funds generated by the VSC must not be used for:

(A) recognition events, receptions, or gifts for a legislator;

(B) recognition events, receptions, or gifts for an employee that are not part of an established award program;

(C) political contributions or lobbying efforts;

(D) alcoholic beverages, unless used at a fund-raising event;

(E) loans, including travel advances;

(F) operating programs, or contracting for programs on behalf of DADS;

(G) cash awards or salary supplementation for employees; or

(H) other purposes determined by DADS to be unethical, unlawful, or inappropriate.

(9) The VSC must not hold funds on behalf of employees for non-VSC-sponsored events.

(10) All funds donated to the VSC remain the property of the VSC until DADS accepts them.

(b) Volunteer Services State Council.

(1) The DADS commissioner designates the manager of Volunteer and Community Engagement as a nonvoting member of the VSSC board of trustees and executive committee.

(2) No employee has expenditure authority for the VSSC.

(3) No employee may process or issue receipts for donations to the VSSC.

(4) No employee may sign a VSSC check or use a VSSC debit or credit card.

(5) DADS may provide the following items of support for the VSSC:

(A) ongoing technical support, including resource development and design;

(B) media assistance, including:

(i) media relations;

(ii) website development and maintenance; and

(iii) graphic design;

(C) employee assistance for coordination of activities;

(D) fund-raising assistance; and

(E) training for volunteers, board members, and officers.

(6) Funds generated by the VSSC may be used only for:

(A) the benefit of the individuals served by its member volunteer groups;

(B) the enhancement of existing operations;

(C) recognition and education projects;

(D) new initiatives that improve the quality of life for individuals served by its member volunteer groups; and

(E) other legitimate expenses.

(7) VSSC funds must not be used for:

(A) recognition events, receptions, or gifts for a legislator;

(B) recognition events, receptions, or gifts for an employee that are not part of an established award program;

(C) political contributions or lobbying efforts;

(D) alcoholic beverages, unless used at a fund-raising event;

(E) loans, including travel advances;

(F) operating programs, or contracting for programs on behalf of DADS;

(G) cash awards or salary supplementation for employees; or

(H) other purposes determined by DADS to be unethical, unlawful, or inappropriate.

(8) The VSSC must not hold funds on behalf of employees for non-VSSC-sponsored events.

§61.107. Volunteer and Community Engagement Manual.

(a) All individuals and groups volunteering or partnering with DADS must abide by all applicable DADS rules, policies, and procedures.

(b) The *DADS Volunteer and Community Engagement Policies and Procedures Manual* can be obtained by calling the Volunteer and Community Engagement office at 512-438-2255, or by writing Department of Aging and Disability Services, Volunteer and Community Engagement W-616, P.O. Box 149030, Austin, Texas 78714-9030.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
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Department of Aging and Disability Services
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CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §92.3, concerning definitions; §92.10, concerning criteria for licensing; §92.12, concerning applicant disclosure requirements; §92.15, concerning renewal procedures and qualifications; §92.41, concerning standards for Type A, Type B, and Type E assisted living facilities; and §92.559, concerning administrative penalties, in Chapter 92, Licensing Standards for Assisted Living Facilities.

Background and Purpose

The purpose of the amendments is to comply with House Bill 1558 and Senate Bill 1055, 79th Texas Legislature, Regular Session, 2005, which added §247.032 to the Texas Health and Safety Code. Section 247.032 requires DADS to accept an accreditation survey of an assisted living facility (facility) conducted by an accreditation commission instead of an initial or annual licensing survey of the facility conducted by DADS staff, under specified circumstances. The statute requires, in part, that the accreditation commission have standards that meet or exceed the state requirements for licensing found in Title 40, Chapter 92 of the Texas Administrative Code. The statute does not require a facility to obtain accreditation by an accreditation commission; it simply offers an accreditation survey conducted by an accreditation commission as an option instead of the initial or annual licensing survey conducted by DADS staff.

Section-by-Section Summary

The amendment to §92.3 adds a definition for "accreditation commission," which references the definition in Texas Health and Safety Code, Chapter 247.

The amendment to §92.10 adds an option for an applicant (a person applying for a license to operate an assisted living facility in Texas) to meet the criteria for licensure by showing affirmatively that the facility meets the standards for accreditation based on an on-site accreditation survey by the accreditation commission. If an applicant chooses this option, the proposed amendment requires the applicant to contact DADS to determine which accreditation commissions meet DADS standards for licensing. The amendment also deletes an obsolete provision for facilities to make reasonable efforts to ensure against any threat to resident health and safety that may result from Year 2000 computer problems.

The amendment to §92.12 adds a requirement that, if an applicant chooses the option to use an accreditation commission's survey to meet licensure requirements, the applicant must submit to DADS, as part of the application, a copy of the facility's accreditation report to the accreditation commission.

The amendment to §92.15 adds an option for a license holder applying for license renewal to meet the criteria for licensure by showing affirmatively that the facility meets the standards for accreditation based on an on-site accreditation survey by the accreditation commission. If a license holder chooses this option, the proposed amendment requires the license holder to contact DADS to determine which accreditation commissions meet DADS standards for licensing and to submit to DADS, as part of the application for license renewal, a copy of the facility's accreditation report to the accreditation commission. The amendment also updates information about where the license holder must send the application for renewal and clarifies the time frames in which an application is considered timely filed.

The amendment to §92.41 adds a licensure standard for Types A, B, and E facilities in new subsection (q), governing a facility's accreditation status. The amendment requires a license holder that uses the option of an on-site accreditation survey by an accreditation commission to provide written notification to DADS if the accreditation commission changes the accreditation status of the license holder. The amendment specifies the time frame in which the license holder must submit the notification as well as the documentation the license holder must submit with the notification.

The amendment to §92.559 adds an administrative penalty for violation of proposed new §92.41(q), concerning a facility's accreditation status. The penalty ranges from $700 to $800 for a small facility (4-16 beds) and $900 to $1,000 for a large facility (17 or more beds).

The amendments also change references to the Texas Department of Human Services (DHS) to DADS.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, there are foreseeable implications relating to costs or revenues of state government. There are no foreseeable implications relating to costs or revenues of local governments.

The effect on state government for the first five years the proposed amendments are in effect is an estimated increase in revenue of $0 in fiscal year (FY) 2007; $0 in FY 2008; $700 in FY 2009; $0 in FY 2010; and $0 in FY 2011. The source of the anticipated increased revenue is the collection of administrative penalties for violations of §92.41(q). The amount of revenue projected is a conservative estimate based on historical deficiencies for fiscal years 2000 through 2006.

Small Business and Micro-business Impact Analysis

DADS has determined that there may be an adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the proposed amendment to §92.41(q), due to the additional administrative penalty that may be imposed against a facility that does not comply with the rule. The administrative penalty schedule (§92.559) contains a range of amounts that may be assessed as an administrative penalty, based on the size of the facility (4-16 beds or 17 or more beds) and whether or not the license holder owns one facility or multiple facilities. The penalty amount for a small facility with a license holder that owns only one facility would be $700, for a small facility with a license holder that owns more than one facility would be $800, for a large facility with a license holder that owns only one facility would be $900, and for a large facility with a license holder that owns more than one facility would be $1,000. Therefore, the size of a business is taken into consideration in assessing an administrative penalty, and a smaller amount will be assessed against smaller facilities and facilities whose license holder owns only one facility. Additionally, the requirement in §92.41(q) is associated with an optional survey process that a facility is not required to undertake.

Public Benefit and Costs

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that assisted living facilities will have the option of using an accreditation survey by an accreditation commission instead of the initial or renewal licensing surveys conducted by DADS staff to satisfy state licensing requirements, if the standards of the accreditation commission meet or exceed state standards.

Ms. Durden anticipates that there may be a cost to persons required to comply with the amendment to §92.559 if a facility violates the provisions concerning accreditation status in §92.41(q) and is assessed an administrative penalty. The amendments will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Jennifer Clay at (512) 438-3529 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-017, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030 or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register.* The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 017" in the subject line.

SUBCHAPTER A. INTRODUCTION

40 TAC §92.3

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§247.001 - 247.069.

§92.3. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) Accreditation commission--Has the meaning given in Health and Safety Code, §247.032.

(2) [~~(1)~~] Affiliate--With respect to a:

(A) partnership, each partner thereof;

(B) corporation, each officer, director, principal stockholder, subsidiary, and each person with a disclosable interest, as the term is defined in this section;

(C) natural person:

(i) each person's spouse;

(ii) each partnership and each partner thereof of which said person or any affiliate of said person is a partner; and

(iii) each corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.

(3) [~~(2)~~] Applicant--A person applying for an assisted living license under Health and Safety Code, Chapter 247.

(4) [~~(3)~~] Attendants--A facility employee who provides direct care to residents. This individual may serve other functions which may include, but are not limited to, aides, cooks, janitors, porters, maids, laundry workers, security personnel, bookkeepers, managers, etc.

(5) [~~(4)~~] Authorized electronic monitoring (AEM)--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

(6) [~~(5)~~] Behavioral emergency--See §92.41(p)(2) of this chapter (relating to Standards for Type A, Type B, and Type E Assisted Living Facilities).

(7) [~~(6)~~] Change of ownership--A change: of 50% or more in the ownership of the business organization that is licensed to operate the facility; in the owner holding the facility license; or in the federal taxpayer identification number.

(8) [~~(7)~~] Co-mingles--The laundering of wearing apparel and/or linens of two or more individuals together.

(9) [~~(8)~~] Controlling person--A person with the ability, acting alone or with others, to directly or indirectly, influence, direct, or cause the direction of the management, expenditure of money, or policies of an assisted living facility or other person. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of an assisted living facility;

(B) any person who is a controlling person of a management company or other business entity that operates an assisted living facility or that contracts with another person for the operation of an assisted living facility; and

(C) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of an assisted living facility, is in a position of actual control or authority with respect to the facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility. This does not include an employee, lender, secured creditor, landlord, or other person who does not exercise formal or actual influence or control over the operation of an assisted living facility.

(10) [~~(9)~~] Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and DADS have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

(11) [~~(10)~~] DADS--The Department of Aging and Disability Services.

(12) [~~(11)~~] DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to DADS.

(13) [~~(12)~~] Dietitian--A person who currently holds a license or provisional license issued by the Texas State Board of Examiners of Dietitians.

(14) [~~(13)~~] Disclosure statement--A DADS form for prospective residents or their representatives that each assisted living facility must complete. The form contains information regarding the preadmission, admission, and discharge process; resident assessment and service plans; staffing patterns; the physical environment of the facility; resident activities; and facility services.

(15) [~~(14)~~] Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(16) [~~(15)~~] Facility--An entity required to be licensed under the Assisted Living Facility Licensing Act, Health and Safety Code, Chapter 247.

(17) [~~(16)~~] Fire suppression authority--The paid or volunteer fire-fighting organization or tactical unit that is responsible for fire suppression operations and related duties once a fire incident occurs within its jurisdiction.

(18) [~~(17)~~] Governmental unit--The state or any county, municipality, or other political subdivision, or any department, division, board, or other agency of any of the foregoing.

(19) [~~(18)~~] Health care professional--An individual licensed, certified, or otherwise authorized to administer health care, for profit or otherwise, in the ordinary course of business or professional practice. The term includes a physician, registered nurse, licensed vocational nurse, licensed dietitian, physical therapist, and occupational therapist.

(20) [~~(19)~~] Immediate threat--There is considered to be an immediate threat to the health or safety of a resident, or a situation is considered to put the health or safety of a resident in immediate jeopardy, if there is a situation in which an assisted living facility's noncompliance with one or more requirements of licensure has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.

(21) [~~(20)~~] Immediately available--The capacity of facility staff to immediately respond to an emergency after being notified through a communication or alarm system. The staff is to be no more than 600 feet from the farthest resident.

(22) [~~(21)~~] Legally authorized representative--A person authorized by law to act on behalf of a person with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(23) [~~(22)~~] Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food services.

(24) [~~(23)~~] Manager--The individual in charge of the day-to-day operation of the facility.

(25) [~~(24)~~] Medication--Medication is any substance:

(A) recognized as a drug in the official United States Pharmacopoeia, Official Homeopathic Pharmacopoeia of the United States, Texas Drug Code Index or official National Formulary, or any supplement to any of these official documents;

(B) intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease;

(C) other than food intended to affect the structure or any function of the body; and

(D) intended for use as a component of any substance specified in this definition. It does not include devices or their components, parts, or accessories.

(26) [~~(25)~~] Medication administration--The direct application of a medication or drug to the body of a resident by an individual legally allowed to administer medication in the state of Texas.

(27) [~~(26)~~] Medication assistance or supervision--The assistance or supervision of the medication regimen by facility staff. Refer to §92.41(j) of this chapter.

(28) [~~(27)~~] Medication (self-administration)--The capability of residents to administer their own medication/treatments without assistance from the facility staff.

(29) [~~(28)~~] NFPA 101--The 1988 publication titled "NFPA 101 Life Safety Code" published by the National Fire Protection Association, Inc., 1 Batterymarch Park, Quincy, Massachusetts 02169.

(30) [~~(29)~~] Person--Any individual, firm, partnership, corporation, association, or joint stock association, and the legal successor thereof.

(31) [~~(30)~~] Person with a disclosable interest--Any person who owns 5.0% interest in any corporation, partnership, or other business entity that is required to be licensed under Health and Safety Code, Chapter 247. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company unless such entity participates in the management of the facility.

(32) [~~(31)~~] Personal care services--Assistance with meals, dressing, movement, bathing, or other personal needs or maintenance; the administration of medication or the assistance with or supervision of medication; or general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in the facility or who needs assistance to manage his or her personal life, regardless of whether a guardian has been appointed for the person.

(33) [~~(32)~~] Physician--A practitioner licensed by the Texas Medical Board [~~Texas State Board of Medical Examiners~~].

(34) [~~(33)~~] Resident--Anyone accepted for care in the assisted living facility.

(35) [~~(34)~~] Respite--The provision by a facility of room, board, and care at the level ordinarily provided for permanent residents of the facility to a person for not more than 60 days for each stay in the facility.

(36) [~~(35)~~] Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

(37) [~~(36)~~] Restraints--Chemical restraints are psychoactive drugs administered for the purposes of discipline or convenience and are not required to treat the resident's medical symptoms. Physical

restraints are any manual method, or physical or mechanical device, material, or equipment attached or adjacent to the resident that restricts freedom of movement. Physical restraints include restraint holds.

(38) [~~(37)~~] Safety--Protection from injury or loss of life due to such conditions as fire, electrical hazard, unsafe building or site conditions, and the hazardous presence of toxic fumes and materials.

(39) [~~(38)~~] Seclusion--The involuntary separation of a resident from other residents and the placement of the resident alone in an area from which the resident is prevented from leaving.

(40) [~~(39)~~] Service plan--A written description of the medical care or the supervision and non-medical care needed by a person.

(41) [~~(40)~~] Short-term acute episode--An illness of less than 30 days duration.

(42) [~~(41)~~] Staff--Any employee of an assisted living facility.

(43) [~~(42)~~] Standards--The minimum licensing standards in Subchapter C of this chapter (relating to Standards for Licensure) intended to protect the health and safety of the residents.

(44) [~~(43)~~] Terminal condition--A medical diagnosis, certified by a physician, of an illness that will result in death in six months or less.

(45) [~~(44)~~] Universal precautions--An approach to infection control in which blood, any body fluids visibly contaminated with blood, and all body fluids in situations where it is difficult or impossible to differentiate between body fluids are treated as if known to be infectious for HIV, hepatitis B, and other blood-borne pathogens.

(46) [~~(45)~~] Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4162

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SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §§92.10, 92.12, 92.15

Statutory Authority

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DHS to license and regulate assisted living facilities.

The amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§247.001 - 247.069.

§92.10. Criteria for Licensing.

(a) - (b) (No change.)

(c) An applicant [~~for a license~~] must submit a complete application form and license fee to DADS [~~the Texas Department of Human Services (DHS)~~]. An application that [~~which~~] remains incomplete after 120 days will be denied.

[~~(d) In respect to all licenses in effect after December 31, 1999: All services provided under licensure by the Texas Department of Human Services are required, as a condition of licensure, not to constitute a threat to the health and safety of residents as a result of computer software, firmware, or imbedded logic unable to recognize different centuries or more than one century on or after January 1, 2000.~~]

(d) [~~(e)~~] An applicant [~~for a license~~] must affirmatively show that[~~:~~]

[~~(1)~~] the applicant, the controlling person, person with a disclosable interest, affiliate, and manager do not have state or federal criminal convictions for any offense that provides a penalty of incarceration.[~~;~~]

[~~(2) the facility meets the standards of the Life Safety Code as applicable to assisted living facilities;~~]

[~~(3) the facility meets the construction standards in Subchapter D of this chapter (relating to Facility Construction); and~~]

[~~(4) the facility meets the standards for operation based on an on-site survey. The initial survey for an applicant for a new license must include the observation of the care of resident(s).~~]

(e) An applicant must affirmatively show that the facility meets:

(1) DADS licensing standards, including Life Safety Code, construction, and operation standards, based on an on-site survey by DADS staff, which must include an observation of the care of a resident; or

(2) the standards for accreditation based on an on-site accreditation survey by the accreditation commission.

(f) An applicant that chooses the option allowed in subsection (e)(2) of this section must contact DADS to determine which accreditation commissions are available to meet the requirements of subsection (e)(2) of this section.

(g) [~~(f)~~] DADS issues a license [~~A license will be issued~~] to a facility meeting all requirements of this chapter. A license is [~~and will be~~] valid for one year. The facility must not exceed the [~~The~~] maximum allowable number of residents specified on the license [~~may not be exceeded~~].

§92.12. Applicant Disclosure Requirements.

(a) Application form. All applications must be made on forms prescribed by and available from DADS [~~the Texas Department of Human Services (DHS)~~]. Each application must be completed in accordance with DADS [~~DHS~~] instructions, signed, and notarized.

(b) General information required. An applicant must file with DADS [~~DHS~~] an application, which contains:

(1) for initial applications and changes of ownership only, evidence of the right to possession of the facility at the time the application will be granted, which may be satisfied by the submission of applicable portions of a lease agreement, deed or trust, or appropriate legal document. The names and addresses of any persons or organizations listed as owner of record in the real estate, including the buildings and surrounding grounds, must be disclosed to DADS [~~DHS~~];

(2) certificate of good standing as issued by the comptroller of public accounts; [~~and~~]

(3) for initial applications and changes of ownership only, the certificate of incorporation as issued by the secretary of state for a corporation or a copy of the partnership agreement for a partnership; and [~~.~~]

(4) if applicable under §92.10(e)(2) of this chapter (relating to Criteria for Licensing), a copy of the applicant's required accreditation report to the accreditation commission.

(c) (No change.)

§92.15. Renewal Procedures and Qualifications.

(a) (No change.)

(b) Each license holder must, at least 45 days before the expiration of the current license, file an application for renewal with DADS. DADS [~~the Texas Department of Human Services (DHS). DHS~~] considers that an individual has filed a timely and sufficient application for the renewal of a license if the license holder submits:

(1) a complete application to DADS [~~DHS~~], and DADS [~~DHS~~] receives the complete application at least 45 days before the current license expires;

(2) an incomplete application to DADS [~~DHS~~] with a letter explaining the circumstances that prevented the inclusion of the missing information, and DADS [~~DHS~~] receives the incomplete application and letter at least 45 days before the current license expires; or

(3) a complete application to DADS, DADS [~~DHS, DHS~~] receives the application during the 45-day period ending on the date the current license expires, and the license holder [~~individual~~] pays a fine under the administrative penalties described in Subchapter H, Division 9 of this chapter (relating to Administrative Penalties).

(c) If the application is postmarked by the filing deadline, the application is considered to be timely filed if received in DADS' Licensing and Credentialing Section, Regulatory Services Division [~~the Facility Enrollment Section of the state office of Long Term Care-Regulatory, DHS~~], within 15 days after the date of the postmark, or [~~. If the application is postmarked by the filing deadline, the application is considered to be timely filed if received in the Facility Enrollment Section of the state office of Long Term Care-Regulatory, DHS,~~] within 30 days after the date of the postmark and the license holder proves to the satisfaction of DADS [~~DHS~~] that the delay was due to the shipper [~~U.S. Postal Service~~]. It is the license holder's responsibility to ensure that the application is timely received by DADS [~~DHS~~].

(d) (No change.)

(e) The application for renewal must contain:

(1) information as required by §92.12 of this chapter [~~title~~] (relating to Applicant Disclosure Requirements);

(2) [~~and~~] the annual licensing fee; and [~~.~~]

(3) if applicable under subsection (g)(2) of this section, a copy of the license holder's required accreditation report to the accreditation commission.

(f) The renewal of a license may be denied for the same reasons an original application for a license may be denied (see §92.17 of this chapter [~~title~~] relating to Criteria for Denying a License or Renewal of a License).

(g) A license holder applying for license renewal must affirmatively show that the facility meets:

(1) DADS licensing standards based on an on-site survey by DADS, which must include an observation of the care of a resident; or

(2) the standards required for accreditation based on an on-site accreditation survey by the accreditation commission.

(h) A license holder applying for license renewal that chooses the option allowed in subsection (g)(2) of this section must contact DADS to determine which accreditation commissions are available to meet the requirements of subsection (g)(2) of this section.

[~~(g) The survey for a license renewal must include the observation of the care of resident(s).~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
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Department of Aging and Disability Services
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SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §92.41

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DHS to license and regulate assisted living facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§247.001 - 247.069.

§92.41. Standards for Type A, Type B, and Type E Assisted Living Facilities.

(a) - (p) (No change.)

(q) Accreditation status. If a license holder uses an on-site accreditation survey by an accreditation commission instead of a licensing survey by DADS, as provided in §92.10(e) and §92.15(g) of this

chapter (relating to Criteria for Licensing; and Renewal Procedures and Qualifications), the license holder must provide written notification to DADS within five working days after the license holder receives a notice of change in accreditation status from the accreditation commission. The license holder must include a copy of the notice of change with its written notification to DADS.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Department of Aging and Disability Services
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SUBCHAPTER H. ENFORCEMENT
DIVISION 9. ADMINISTRATIVE PENALTIES

40 TAC §92.559

Statutory Authority

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DHS to license and regulate assisted living facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§247.001 - 247.069.

§92.559. What is the administrative penalty schedule?

The administrative penalty schedule lists the gradations of administrative penalty fees:
Figure: 40 TAC §92.559

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 98. ADULT DAY CARE AND DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§98.2, 98.11 - 98.23, 98.41 - 98.44, 98.81 - 98.84, 98.92 - 98.95, 98.102 - 98.104, and 98.202 - 98.212, concerning definitions, application procedures, facility construction procedures, licensure and program requirements, inspections, surveys, and visits, abuse, neglect and exploitation, enforcement, and Day Activity and Health Services (DAHS) contractual requirements, in Chapter 98, Adult Day Care and Day Activity and Health Services Requirements.

Background and Purpose

The purpose of the amendments is to update references in the rules to the National Fire Protection Association's (NFPA) Life Safety Code from the 1988 edition to the 2000 edition.

In addition, the proposal updates terminology and agency names and corrects rule cross-references to ensure that the rule reflects changes resulting from the consolidation of health and human services agencies in 2004 and updates the sections to make them consistent with other DADS rules.

Section-by-Section Summary

The amendments to §§98.2, 98.11, 98.41, and 98.42 update references to the Life Safety Code from the 1988 edition to the 2000 edition. The amendment to §98.42(d)(1)(A)(ii) requires facility staff to conduct monthly fire drills and daily exit inspections. The amendment to §98.42(d)(1)(D) requires a facility to report serious injuries, deaths, or disasters to DADS within 24 hours after the occurrence.

The amendment to §98.11(c) also deletes obsolete Year 2000 (Y2K) requirements.

The amendments to §§98.2, 98.11 - 98.23, 98.41 - 98.44, 98.81 - 98.84, 98.92 - 98.95, 98.102 - 98.104, and 98.202 - 98.212 update agency names, clarify rule language, update and add definitions, and correct rule cross-references.

The amendment to §98.212(a) clarifies the sanctions available to DADS for a DAHS facility.

Fiscal Note

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

Small Business and Micro-business Impact Analysis

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses or on businesses of any size as a result of enforcing or administering the amendments. The change to a more recent code reflects the current emphasis on emergency preparedness by requiring monthly fire drills and daily exit inspections by facility staff, which are additional requirements. However, performing these tasks and maintaining the associated documents should not require additional staff.

Public Benefit and Costs

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that DADS rules will require adult day care facilities to meet a code that recognizes the latest fire safety technology.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

Takings Impact Assessment

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

Public Comment

Questions about the content of this proposal may be directed to Jennifer Clay at (512) 438-3529 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-5027, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, TX 78714-9030 or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to rulescomments@dads.state.tx.us. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 5027" in the subject line.

SUBCHAPTER A. INTRODUCTION

40 TAC §98.2

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §§103.001 - 103.011 and 161.021.

§98.2. Definitions.

The following words and terms, when used in this chapter, [~~shall~~] have the following meanings, unless the context clearly indicates otherwise.

(1) - (6) (No change.)

(7) Applicant--A person applying for a license [~~required to be licensed~~] under Texas Human Resources Code, Chapter 103.

(8) Authorization--A [~~Texas~~] Department of Aging and Disability [~~Human~~] Services' (DADS') [~~(DHS's)~~] employee decision, before services begin and before payment can be made, that Day Activity and Health Services (DAHS) may be provided to a client.

(9) Caseworker--A DADS [~~DHS~~] employee who is responsible for DAHS case management activities. Activities include[~~, but are not limited to,~~] eligibility determination, client registration, assessment and reassessment of client's need, service plan development, and intercession on the client's behalf.

(10) Client--A person who receives the services of an adult day care program, including a DAHS [~~Day Activities and Health Services~~] program.

(11) Construction, existing--See definition of existing building.

(12) Construction, new--Construction begun after April 1, 2007.

(13) Construction, permanent--A building or structure that meets a nationally recognized building code's details for foundations, floors, walls, columns, and roofs.

(14) [~~(11)~~] Contract manager--A DADS [~~DHS~~] employee, designated as the primary contact point between the facility and DADS [~~DHS~~], who is responsible for the overall management of the DAHS contract.

(15) DADS--The Department of Aging and Disability Services.

(16) DAHS facility--An entity that contracts with DADS to provide day activity and health services.

(17) [~~(12)~~] Day Activity and Health Services (DAHS)--Day activity and health services provided under a contract with DADS [~~DHS~~] to clients residing in the community [~~through rehabilitative nursing and social services~~].

(18) [~~(13)~~] Days--Calendar days, not workdays, unless otherwise noted in the text.

(19) [~~(14)~~] Department--Department of Aging and Disability Services [~~Texas Department of Human Services~~].

(20) [~~(15)~~] DHS--Formerly, this term referred to the Texas Department of Human Services; it now refers to DADS [~~Texas Department of Human Services~~].

(21) [~~(16)~~] Dietitian consultant [~~Consultant~~]--A registered dietitian; a person licensed by the Texas State Board of Examiners of Dietitians; or a person with a baccalaureate degree with major studies in food and nutrition, dietetics, or food service management.

(22) [~~(17)~~] Direct service staff--An employee [~~Employees~~] of a facility who provides direct services to clients, including the director, a licensed nurse, the activities director, and an attendant [~~attendants~~]. An attendant is a person who may provide direct services to clients of the facility such as a facility bus driver, food service worker, aide, janitor, porter, maid, and laundry worker.

(23) [~~(18)~~] Director--The person responsible for the overall operation of a facility.

(24) [~~(19)~~] Elderly person--A person 65 years of age or older.

(25) [~~(20)~~] Existing building--In these standards, except where defined otherwise, a building either occupied as an adult day care facility at the time of initial inspection by DADS [~~the department~~] or converted to occupancy as an adult day care facility.

(26) [~~(21)~~] Exploitation--An [~~The~~] illegal or improper act or process of a caretaker, family member, or other individual, who has an ongoing relationship with the elderly person or person with a disability, using the resources of an elderly person or person with a disability for monetary or personal benefit, profit, or gain without the informed consent of the elderly person or person with a disability.

(27) [~~(22)~~] Facility--An adult day care facility, unless otherwise specified [~~See definition for adult day care facility~~].

(28) Fence--A barrier to prevent elopement of a client or intrusion by an unauthorized person, consisting of posts, columns, or other support members, and vertical or horizontal members of wood, masonry, or metal.

(29) FM approval--A third-party certification of a product by FM (formerly known as Factory Mutual Insurance Company). FM approval provides third-party certification and testing of products acceptable to DADS.

(30) [~~(23)~~] Fraud--A deliberate misrepresentation or intentional concealment of information to receive or to be reimbursed for service delivery to which an [~~the~~] individual is not entitled.

(31) [~~(24)~~] Functional impairment--A condition [~~Condition~~] that requires assistance with one or more personal care services including [~~, but not limited to,~~] bathing, dressing, preparing meals, feeding, grooming, taking self-administered medication, toileting, and ambulation.

(32) [~~(25)~~] Handicapped person--As used in this chapter, the term "person with disabilities" is used in place of the term "handicapped person" as that term is used in Texas [~~the~~] Human Resources Code, Chapter 103.

(33) [~~(26)~~] Health assessment--A plan of care that identifies the specific needs of a [~~the~~] client and how those needs will be addressed by a [~~the~~] facility.

(34) [~~(27)~~] Health services--Health services include [~~Includes~~] personal care, nursing, and [~~or~~] therapy services. Personal care services include services listed under the definition of functional impairment in this section. Nursing services may include the administration of medications; physician-ordered treatments, such as dressing changes; and monitoring the health condition of the individual. Therapy services may include physical, occupational, or speech therapy.

(35) [~~(28)~~] Human services--All of the following major areas constitute human services:

(A) personal social services (day care, counseling [~~counselling~~], in-home care, protective services);

(B) health services (home health, family planning, preventive health programs, nursing home, hospice);

(C) education services (all levels of school, Head Start, vocational programs);

(D) housing and urban environment services (Section 8, public housing);

(E) income transfer services (Temporary Assistance for Needy Families, Food Stamps); and

(F) justice and public safety services (parole and probation, rehabilitation).

(36) [~~(29)~~] Human service program--An intentional, organized, ongoing effort designed to provide good to others. The characteristics of human service programs are that they are:

(A) dependent on public resources and are planned and provided by the community;

(B) directed toward meeting human needs arising from day-to-day socialization, health care, and developmental experiences;

(C) used to aid, rehabilitate, or treat those in difficulty or need.

(37) [~~(30)~~] Income-eligible--An adult who is either a supplemental security income (SSI) or Temporary Assistance for Needy Families (TANF) client, but who has an income that is equal to or less than the eligibility level established by the Health and Human Services Commission [~~DHS~~] for DAHS services.

(38) [~~(31)~~] Individual plan of care--A written plan that [~~which~~] documents functional impairment and the health, social, and related support needed by an individual. The plan is developed jointly with and approved by the individual or [~~and/or~~] responsible party.

(39) [~~(32)~~] Licensed vocational nurse (LVN)--A person currently licensed by the Board of [~~Vocational~~] Nurse Examiners for the State of Texas who works under the supervision of a registered nurse (RN) or a physician.

(40) Life Safety Code, NFPA 101--The Code for Safety to Life from Fire in Buildings and Structures, NFPA 101, a publication of the National Fire Protection Association, Inc. The Life Safety Code, NFPA 101, addresses those construction, protection, and occupancy features necessary to minimize danger to life from fire, including smoke, fumes, or panic. The Life Safety Code, NFPA 101, establishes minimum criteria for the design of egress features so as to permit prompt escape of occupants from buildings or, where desirable, into safe areas within the building.

(41) [~~(33)~~] Long-term care facility--A facility that provides care and treatment or personal care services to four or more unrelated persons, including a nursing facility, an assisted living [~~a personal care~~] facility, and a facility serving persons with mental retardation and related conditions.

(42) [~~(34)~~] Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of client services. Management services do not include contracts solely for maintenance, laundry, or food services.

(43) [~~(35)~~] Manager--A person having a contractual relationship to provide management services to a facility.

(44) [~~(36)~~] Medicaid-eligible--An individual who is eligible for Medicaid [~~as an SSI or a TANF client, or eligible for medical assistance only while living in the community, or eligible through a federally-approved waiver~~].

(45) [~~(37)~~] Medically-related program--A human services program under the human services-health services category in the definition of human services in this section.

(46) [~~(38)~~] Neglect--The failure to provide for oneself the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness; or the failure of a caregiver to provide these goods or services.

(47) NFPA--The National Fire Protection Association. NFPA is an organization that develops codes, standards, recommended

practices, and guides through a consensus standards development process approved by the American National Standards Institute.

(48) NFPA 10--Standard for Portable Fire Extinguishers. A standard developed by NFPA for the selection, installation, inspection, maintenance, and testing of portable fire extinguishing equipment.

(49) NFPA 13--Standard for the Installation of Sprinkler Systems. A standard developed by NFPA for the minimum requirements for the design and installation of automatic fire sprinkler systems, including the character and adequacy of water supplies and the selection of sprinklers, fittings, pipes, valves, and all maintenance and accessories.

(50) NFPA 70--National Electrical Code. A code developed by NFPA for the installation of electric conductors and equipment.

(51) NFPA 72--National Fire Alarm Code. A code developed by NFPA for the application, installation, performance, and maintenance of fire alarm systems and their components.

(52) NFPA 90A--Standard for the Installation of Air Conditioning and Ventilating Systems. A standard developed by NFPA for systems for the movement of environmental air in structures that serve spaces over 25,000 cubic feet or buildings of certain heights and construction types, or both.

(53) NFPA 90B--Standard for the Installation of Warm Air Heating and Air-Conditioning Systems. A standard developed by the NFPA for systems for the movement of environmental air in one- or two-family dwellings and structures that serve spaces not exceeding 25,000 cubic feet.

(54) NFPA 96--Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations. A standard developed by NFPA that provides the minimum fire safety requirements related to the design, installation, operation, inspection, and maintenance of all public and private cooking operations, except for single-family residential usage.

(55) [~~(39)~~] Nurse--A registered nurse (RN) or a licensed vocational nurse (LVN) licensed in the state of Texas.

(56) [~~(40)~~] Nursing services--Services provided by licensed nursing personnel, which include[~~, but are not limited to,~~] observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.

(57) [~~(41)~~] Person--An individual, corporation, or association.

(58) [~~(42)~~] Person with a disclosable interest--A person with a disclosable interest is any person who owns five percent interest in any corporation, partnership, or other business entity that is required to be licensed under Texas Human Resources Code, Chapter 103. A person with a disclosable interest does not include a bank, savings and loan, savings bank, trust company, building and loan association, credit union, individual loan and thrift company, investment banking firm, or insurance company unless such entity participates in the management of the facility.

(59) [~~(43)~~] Person with disabilities--A person whose functioning is sufficiently impaired to require frequent medical attention, counseling, physical therapy, therapeutic or corrective equipment, or another person's attendance and supervision.

(60) [~~(44)~~] Physician's orders--An order for DAHS that is signed and dated by a medical doctor (MD) or doctor of osteopathy (DO) who is licensed to practice medicine in the state of Texas. The physician's order must include the physician's license number.

(61) [~~(45)~~] Plan of care--See definition of health assessment.

(62) [~~(46)~~] Protective setting--A setting in which an individual's safety is ensured by the physical environment or [~~and/or~~] personnel (staff).

(63) [~~(47)~~] Registered nurse (RN)--A person currently licensed [~~registered~~] by the [~~Texas~~] Board of Nurse Examiners for the State of Texas to practice professional nursing.

(64) [~~(48)~~] Related support services--Provision of services to the client, family member, or other caregivers that may improve their ability to assist with an individual's independence and functioning. Services include[~~, but are not limited to,~~] information and referral, transportation, teaching caregiver skills, respite, counseling, instruction and training, and support groups.

(65) [~~(49)~~] Responsible party--Anyone the client designates as his representative.

(66) [~~(50)~~] Safety--Action taken to protect from injury or loss of life due to such conditions as fire, electrical hazard, unsafe building or site conditions, and the presence of hazardous materials.

(67) [~~(51)~~] Sanitation--Action taken to protect from illness, the transmission of disease, or loss of life due to unclean surroundings, the presence of disease transmitting insects or rodents, unhealthful conditions or practices in the preparation of food and beverage, or the care of personal belongings.

(68) [~~(52)~~] Semi-ambulatory [~~Semiambulatory~~]--Mobility relying on walker, crutch, cane, other physical object, or independent use of wheelchair.

(69) Serious injury--An injury requiring emergency medical intervention or treatment by medical personnel, either at a facility or at an emergency room or medical office.

(70) [~~(53)~~] Social activities--Therapeutic, educational, cultural enrichment, recreational, and social activities on site or in the community in a planned program to meet the social needs and interests of the individual.

(71) UL--Underwriters Laboratories, Inc. UL approval provides third-party certification and testing of products acceptable to DADS.

(72) [~~(54)~~] Working with people--Responsible for the delivery of services to individuals either directly or indirectly. Experience as a manager would meet this definition; however, an administrative support position such as a bookkeeper does not. Experience does not have to be in a paid capacity. A person serving as a minister receiving an expense allowance in money plus free housing qualifies for experience in working with people.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §§98.11 - 98.23

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §§103.001 - 103.011 and 161.021.

§98.11. Criteria for Licensing.

(a) (No change.)

(b) An applicant for a license must submit a complete application form and license fee to DADS [~~the Texas Department of Human Services (DHS)~~].

[~~(c) In respect to all licenses in effect after December 31, 1999, all services provided under licensure by DHS are required, as a condition of licensure, not to constitute a threat to the health and safety of residents as a result of computer software, firmware, or computer logic unable to recognize different centuries or more than one century on or after January 1, 2000.~~]

(c) [~~(d)~~] An applicant for a license must affirmatively show the following:

(1) the applicant, person with a disclosable interest, affiliate, and manager do not have state or federal criminal convictions for any offense that provides a penalty of incarceration;

(2) the facility meets the standards of the Life Safety Code, NFPA 101, 2000 edition [~~1988~~];

(3) the facility meets the construction standards in Subchapter C of this chapter; and

(4) the facility meets the requirements [~~standards~~] for operation based on an on-site survey.

(d) [~~(e)~~] DADS [~~DHS~~] may deny an application that remains incomplete after 120 days.

(e) [~~(f)~~] A license will be issued to a facility meeting all requirements of this chapter and will be valid for one year. The maximum allowable number of clients specified on the license may not be exceeded.

(f) [~~(g)~~] The license must be posted in the area where clients are admitted and accessible to them and [~~and/or~~] their legal guardians.

§98.12. Building Approval.

(a) Local fire authority. All applications for license must include the written approval of the local fire authority that the facility and its operation meet local fire ordinances. The written approval must be submitted on the forms and in the manner specified by DADS [~~the Texas Department of Human Services (DHS)~~].

(b) Local health authority. The following procedures allow the local health authority to provide recommendations to DADS [~~DHS~~] concerning licensure of a facility.

(1) New facility. The sponsor of a new facility under construction or a previously unlicensed facility will provide to DADS [~~DHS~~] a copy of a dated written notice to the local health authority that construction or modification has been or will be completed by a specific date. The sponsor will also provide a copy of a dated written notice of the approval for occupancy by the local fire marshal or local building code authority, if applicable. The local health authority may provide recommendations to DADS' Regulatory Services Licensing and Credentialing Section [~~DHS's Long Term Care Regulatory (LTC-R) Facility Enrollment Section~~] regarding the status of compliance with local codes, ordinances, or regulations.

(2) Increase in capacity. The license holder must request an application for increase in capacity from DADS' Regulatory Services Licensing and Credentialing [~~DHS's LTC-R Facility Enrollment~~] Section. DADS' Regulatory Services Licensing and Credentialing [~~DHS's LTC-R Facility Enrollment~~] Section must provide the license holder with the application form, and the license holder must notify the local fire marshal and the local health authority of the request. The license holder must arrange for the inspection of the facility by the local fire marshal. The facility must send DADS' Regulatory Services Licensing and Credentialing [~~DHS's LTC-R Facility Enrollment~~] Section a copy of the written notice sent to the local health authority notifying them of the increase in capacity. DADS [~~DHS~~] will approve the application only if the facility is found to be in compliance with the standards. Approval to occupy the increased capacity may be granted by DADS before [~~DHS prior to~~] the issuance of the license covering the increased capacity after inspection by DADS [~~DHS~~] if standards are met.

(3) Change of ownership. The applicant for a change of ownership license will provide to DADS [~~DHS~~] a copy of a letter notifying the local health authority of the request for a change of ownership. The local health authority may provide recommendations to DADS [~~DHS~~] regarding the status of compliance with local codes, ordinances, or regulations.

(4) Renewal. DADS [~~DHS~~] sends the local health authority a copy of the DADS [~~DHS~~] license renewal notice specifying the expiration date of the facility's current license. The local health authority may provide recommendations to DADS [~~DHS~~] regarding the status of compliance with local codes, ordinances, or regulations. The local authority may also recommend that a state license be issued or denied; however, the final decision on licensure status remains with DADS [~~DHS~~].

§98.13. Applicant Disclosure Requirements.

(a) (No change.)

(b) Disclosure form. All applications must be made on forms prescribed by and available from DADS [~~the Texas Department of Human Services (DHS)~~]. Each application must be completed in accordance with DADS [~~DHS~~] instructions, signed, and notarized.

(c) General information required.

(1) For initial applications and change of ownership only, evidence of the right to possession of the facility at the time the application will be granted, which may be satisfied by the submission of applicable portions of a lease agreement, deed or trust, or appropriate legal document, must be filed with DADS [~~DHS~~]. The names and addresses of any persons or organizations listed as owner of record in the real estate, including the buildings and grounds appurtenant to the buildings, must be disclosed to DADS [~~DHS~~].

(2) - (3) (No change.)

(4) At the request of DADS [~~DHS~~], an applicant or license holder must provide to DADS [~~DHS~~] any additional background information within 30 days after DADS' [~~of DHS's~~] request.

(d) (No change.)

§98.14. Increase in Capacity.

(a) During the license term, a license holder may not increase capacity without approval from DADS [~~the Texas Department of Human Services (DHS)~~]. The license holder must submit to DADS [~~DHS~~] a complete application for increase in capacity on a form provided by DADS [~~DHS~~].

(b) Upon approval of an increase in capacity, DADS [~~DHS~~] will issue a new license.

§98.15. Renewal Procedures and Qualifications.

(a) (No change.)

(b) Each license holder must file an application for renewal with DADS [~~the Texas Department of Human Services (DHS)~~] at least 45 days before [~~prior to~~] the expiration of the current license. DADS [~~DHS~~] considers that an individual has filed a timely and sufficient application for the renewal of a license, if the license holder:

(1) submits a complete application to DADS [~~DHS~~], and DADS [~~DHS~~] receives that complete application at least 45 days before the current license expires; or

(2) submits an incomplete application to DADS [~~DHS~~] with a letter explaining the circumstances that [~~which~~] prevented the inclusion of the missing information, and DADS [~~DHS~~] receives the incomplete application and letter at least 45 days before the current license expires. The missing information must be provided and the application completed within 30 days before [~~of~~] the current license expiration date or the application may be denied for failure to provide the required information.

(c) If the application is postmarked by the filing deadline, the application will be considered to be timely filed if received in DADS' Regulatory Services Licensing and Credentialing Section [~~the Licensing Section of the state office of Long-Term Care-Regulatory, Texas Department of Human Services,~~] within 15 days after [~~of~~] the postmark.

(d) - (f) (No change.)

(g) The facility must have an annual inspection by the local fire marshal [~~marshall~~] as part of the renewal procedures.

§98.16. Change of Ownership.

(a) During the license term, a license holder may not transfer the license as a part of the sale of the facility. Before [~~Prior to~~] the sale of the facility, the license holder must notify DADS [~~the Texas Department of Human Services (DHS)~~] that a change of ownership will be occurring. A change of ownership is a change:

(1) (No change.)

(2) in the federal taxpayer [~~tax payer~~] identification number.

(b) To avoid a gap in the license because of a change in ownership of the facility, the prospective purchaser must submit to DADS [~~DHS~~] a complete application for a license under §98.11 of this title (relating to Criteria for Licensing) at least 30 days before the anticipated date of sale. The applicant must meet all requirements for a license. If the applicant has filed a timely and sufficient application for a license and otherwise meets all requirements for a license, DADS [~~DHS~~] will issue the applicant a license effective on the date of transfer of ownership. DADS [~~DHS~~] considers an individual has filed a timely and sufficient application for a license if the individual:

(1) submits a complete application to DADS [~~DHS~~], and DADS [~~DHS~~] receives that complete application at least 30 days before the anticipated date of sale;

(2) submits an incomplete application to DADS [~~DHS~~] with a letter explaining the circumstances that [~~which~~] prevented the inclusion of the missing information, and DADS [~~DHS~~] receives the incomplete application and letter at least 30 days before the anticipated date of sale; or

(3) submits an application to DADS [~~DHS~~], and DADS [~~DHS~~] receives the application by the date of sale, and the individual proves to DADS' [~~DHS's~~] satisfaction that the health and safety of the facility clients required an emergency change of ownership.

(c) If the application is postmarked by the filing deadline, the application will be considered to be timely filed if received in DADS' Regulatory Services Licensing and Credentialing Section [~~the Licensing Section of the state office of Long-Term Care-Regulatory, Texas Department of Human Services,~~] within 15 days after [~~of~~] the postmark.

§98.17. Change of Staff.

(a) A new facility director must submit qualifying documentation (see §98.62 of this title (relating to Program Requirements)) for approval to the DADS Regulatory Services [~~by the Long Term Care-Regulatory (LTC-R)~~] Regional Office[~~, Texas Department of Human Services (DHS),~~] within 30 days before or after [~~of~~] the change. If the facility director leaves, a new facility director must be in place within 30 days after [~~of~~] such vacancy.

(b) A new facility activities director must submit qualifying documentation (see §98.62 of this title [~~(relating to Program Requirements)~~]) for approval within 30 days before or after [~~of~~] the change. A new facility activities director must be in place within 30 days after [~~of~~] such vacancy.

(c) If the facility does not have a director or activities director within 30 days after [~~of~~] vacancy, the facility must [~~will~~] submit a letter to the DADS Regulatory Services [~~LTC-R~~] Regional Office requesting an extension. The DADS Regulatory Services [~~LTC-R~~] Regional Office will notify the facility in writing of the length of extension.

§98.18. Time Periods for Processing Licensing Applications.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] will process only applications received within 60 days before [~~prior to~~] the requested date of the issuance of the license.

(b) (No change.)

(c) If the application is postmarked by the filing deadline, the application will be considered to be timely filed if received in DADS' Regulatory Services Licensing and Credentialing Section [~~the Licensing Section of the state office of Long-Term Care-Regulatory , Texas Department of Human Services,~~] within 15 days after [~~of~~] the postmark.

(d) Regulatory [~~Long-Term Care-Regulatory~~] Services will notify facilities within 30 days after [~~of~~] receipt of the application if any of the following applications are incomplete:

(1) - (4) (No change.)

(e) Except as provided in the following sentence, a license will be issued or denied within 30 days after [~~of~~] the receipt of a complete application or within 30 days before [~~prior to~~] the expiration date of the license. However, DADS [~~DHS~~] may delay an action on an application for renewal of a license for up to six months if the facility is subject to a proposed or pending licensure termination action on or within 30 days before [~~prior to~~] the expiration date of the license. The issuance of the license constitutes DADS' [~~DHS's~~] official written notice to the facility of the acceptance and filing of the application.

(f) - (g) (No change.)

(h) If the request for full reimbursement is denied, the applicant may appeal directly to the DADS commissioner for resolution of the dispute. The applicant must send a written statement to the DADS commissioner describing the request for reimbursement and the reasons for it. The program director also may send a written statement to the DADS commissioner describing the program's reasons for denying reimbursement. The DADS commissioner makes a timely decision concerning the appeal and notifies the applicant and the program in writing of the decision.

§98.19. Criteria for Denying a License or Renewal of a License.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] may deny an initial license or refuse to renew a license if an applicant, manager, or affiliate:

(1) substantially fails to comply with the requirements described in §§98.42, 98.43, 98.61, and 98.62 of this title (relating to Safety; Sanitation; General Requirements; and Program Requirements), [~~§§98.61-98.62 of this title (relating to General Requirements and Program Requirements), and §§98.42-98.43 of this title (relating to Safety and Sanitation)~~] including [~~, but not limited to~~]:

(A) - (B) (No change.)

(2) - (3) (No change.)

(4) knowingly provides the following false or fraudulent information:

(A) submits false or intentionally misleading statements to DADS [~~DHS~~];

(B) - (E) (No change.)

(5) (No change.)

(6) discloses any of the following actions within the two-year period preceding the application:

(A) - (E) (No change.)

(F) suspension of a license to operate a health facility, long-term care facility, assisted living [~~personal care~~] facility, or a similar facility in any state.

(b) Concerning subsection (a)(6) of this section, DADS [~~DHS~~] may consider exculpatory information provided by the applicant, manager, or affiliate to grant a license under subsection (a)(6) of this section if DADS [~~DHS~~] finds the applicant, manager, or affiliate able to comply with the rules in this chapter.

(c) DADS [~~DHS~~] will not issue a license to an applicant to operate a new facility if the applicant discloses any of the following actions during the two-year period preceding the application:

(1) revocation of a license to operate a health care facility, long-term care facility, assisted living [~~personal care~~] facility, or similar facility in any state;

(2) - (3) (No change.)

(d) - (e) (No change.)

(f) If DADS [~~DHS~~] denies a license or refuses to issue a renewal of a license, the applicant or licensee may request a formal appeal by following the Health and Human Services Commission's formal hearing procedures in 1 TAC, Chapter 357, Subchapter I. A formal administrative hearing is conducted in accordance with Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC, Chapter 357, Subchapter I [~~an administrative hearing. Administrative hearings must be held under the provisions of the Administrative Procedures Act (APA), Title 10 of the Texas Government Code, §§2001.051 et seq., and DHS's formal hearing rules in Chapter 79 of this title, Subchapter Q (relating to Formal Appeals)~~].

§98.20. Opportunity to Show Compliance [~~Informal Reconsideration~~].

(a) Before the institution of proceedings to revoke or suspend a license or deny an application for the renewal of a license, DADS [~~the Texas Department of Human Services (DHS)~~] gives the license holder:

(1) (No change.)

(2) an opportunity to show compliance with all requirements of law for the retention of the license by sending the director of Regulatory Services [~~Long Term Care-Regulatory~~] a written request for an opportunity to show compliance [~~informal review~~]. The request must:

(A) be postmarked within 10 days after [~~of~~] the date of DADS' [~~DHS's~~] notice and be received in the state office of the director of Regulatory Services [~~Long Term Care-Regulatory~~] within 10 days after [~~of~~] the date of the postmark; and

(B) contain specific documentation refuting DADS' [~~DHS's~~] allegations.

(b) DADS' [~~DHS's~~] review will be limited to a review of documentation submitted by the license holder and information used by DADS [~~DHS~~] as the basis for its proposed action and will not be conducted as an adversary hearing. DADS [~~DHS~~] will give the license holder a written affirmation or reversal of the proposed action.

§98.21. License Fees.

The license fee is $25. The fee must be paid with each initial application, change of ownership application, and annually with each application for renewal of the license. Payment of fees must be by check or money order made payable to "The Department of Aging and Disability Services" [~~the Texas Department of Human Services~~].

§98.22. Plan Review Fees.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] charges a fee to review plans for new buildings and the [~~,additions,~~] conversion of buildings not licensed by DADS, and for additions and the [~~DHS, or~~] remodeling of existing licensed facilities.

(b) The fee schedule follows:

(1) New buildings or conversion of buildings not licensed by DADS [~~facility~~]--$12 per client (minimum $500 and maximum $1,000).[~~;~~]

(2) (No change.)

§98.23. Relocation.

(a) A license holder must [~~may~~] not relocate a facility to another location without approval from DADS [~~the Texas Department of~~

~~Human Services (DHS)~~]. The license holder must submit a complete application and the fee required under §98.21 of this title (relating to License Fees) to DADS [~~DHS~~] before the relocation.

(b) Clients must [~~Residents may~~] not be relocated until the new building has been inspected and approved as meeting the standards of the Life Safety Code, NFPA 101, 2000 edition, as applicable to adult day care facilities.

(c) Following Life Safety Code, NFPA 101, 2000 edition, approval by DADS [~~DHS~~], the license holder must notify DADS [~~DHS~~] of the date clients [~~residents~~] will be relocated. If the new facility meets the standards for operation based on an on-site survey, a license will be issued.

(d) The effective date of this license will be the date all clients [~~residents~~] are relocated.

(e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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General Counsel
Department of Aging and Disability Services
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SUBCHAPTER C. FACILITY CONSTRUCTION PROCEDURES

40 TAC §§98.41 - 98.44

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §§103.001 - 103.011 and 161.021.

§98.41. Construction and Initial Survey of Completed Construction.

(a) Construction phase.

(1) DADS' Regulatory Services Licensing and Credentialing Section [~~The Texas Department of Human Services (DHS) Facility Enrollment in Austin, Texas,~~] must be notified in writing before [~~prior to~~] construction starts [~~start~~].

(2) All construction must be done in accordance with minimum licensing requirements. It is the sponsor's responsibility to employ qualified personnel to prepare the contract documents for construction of a new facility or remodeling of an existing facility. Contract documents for additions and remodeling and for the construction of an entirely new facility must be prepared by an architect licensed by the Texas [~~State~~] Board of Architectural Examiners. Drawings must bear the seal of the architect. Certain parts of final plans, designs, and specifications must bear the seal of a registered professional engineer approved by the Texas [~~State~~] Board of [~~Registration for~~] Professional Engineers to operate in Texas. These certain parts include sheets and sections covering structural, electrical, mechanical, and sanitary engineering.

(A) Remodeling is the construction, removal, or relocation of walls and partitions; the construction of foundations, floors, or ceiling-roof assemblies; the expanding or altering of safety systems (including [~~, but not limited to,~~] sprinkler, fire alarm, and emergency systems); or the conversion of space in a facility to a different use.

(B) General maintenance and repairs of existing material and equipment, repainting, applications of new floor, wall, or ceiling finishes, or similar projects are not included as remodeling, unless as a part of new construction. DADS [~~DHS~~] must be provided flame spread documentation for new materials applied as finishes.

(b) Contract documents.

(1) - (10) (No change.)

(11) Heating, ventilation, and air-conditioning (HVAC) documents must include sufficient details of HVAC systems and components to assure a safe and properly operating installation, including [~~, but not limited to,~~] heating, ventilating, and air-conditioning layout, ducts, protection of duct inlets and outlets, combustion air, piping, exhausts, and duct smoke, [~~and/or~~] fire dampers, or combination fire and smoke dampers; and equipment types, sizes, and locations.

(12) - (14) (No change.)

(c) Initial survey of completed construction.

(1) Upon completion of construction, including grounds and basic equipment and furnishings, a final construction inspection (initial survey) of the facility, including additions or remodeled areas, is required to be performed by the DADS Regulatory Services [~~Long Term Care-Regulatory~~] Regional Office before [~~prior to~~] occupancy. The completed construction must have the written approval of the local authorities having jurisdiction, including the fire marshal and building inspector.

(2) After the completed construction has been surveyed by DADS [~~DHS~~] and found acceptable, this information will be conveyed to DADS' Regulatory Services Licensing and Credentialing Section [~~Facility Enrollment of DHS~~] as part of the information needed to issue a license to the facility. In the case of additions or remodeling of existing facilities, a revision or modification to an existing license may be necessary. The building, grades, drives, and parking must essentially be 100% complete at the time of this initial visit for occupancy approval and licensing, including basic furnishings and operational needs. A facility may accept up to three clients between the time it receives initial approval from DADS [~~DHS~~] and the time the license is issued.

(3) The following documents must be available to DADS' [~~DHS's~~] surveyor at the time of the survey of the completed building:

(A) (No change.)

(B) written certification of the fire alarm system by the installing agency (Fire Alarm Installation Certificate [~~Form~~ ~~FML-009~~] of the Texas State Fire Marshal);

(C) documentation for all [~~of~~] materials used in the building that [~~which~~] are required to have a specific limited fire or flame spread rating, including special wall finishes or floor coverings, flame retardant curtains (including cubicle curtains), and rated ceilings[~~, etc~~]. This documentation must include a signed letter from the installer [~~, in the case of carpeting, for example,~~] verifying that the material [~~carpeting~~] installed is named in the laboratory test document;

(D) approval of the completed sprinkler system installation by the designing engineer, including a[~~. A~~] copy of the material list and test certification [~~must be available~~];

(E) - (F) (No change.)

(G) a written statement from an architect or engineer [~~architect/engineer~~] stating that he certifies that the building was constructed to meet [~~NFPA 101,~~] Life Safety Code, NFPA 101, 2000 edition, and all locally applicable codes, and that the facility is in substantial conformance with minimum licensing requirements; and

(H) (No change.)

(d) Nonapproval of new construction.

(1) If, during the initial on-site survey of completed construction, the surveyor finds certain basic requirements not met, he may recommend to DADS [~~DHS~~] that the facility not yet be licensed and approved for occupancy. Such basic items may include the following:

(A) construction that [~~which~~] does not meet minimum code or licensure standards for basic requirements such as corridors being less than required width, ceilings installed at less than the minimum seven-foot six-inch height, client bedroom dimensions less than required, and other such features that [~~which~~] would disrupt or otherwise adversely affect the clients and staff if corrected after occupancy;

(B) (No change.)

(C) fire protection systems not completely installed or not functioning properly, including [~~, but not limited to,~~] fire alarm systems, emergency power and lighting, and sprinkler systems;

(D) required exits not all usable according to Life Safety Code, NFPA 101, 2000 edition [~~1988 require- ments~~];

(E) - (F) (No change.)

(G) any other basic operational or safety feature that [~~which~~] the surveyor, as the authority having jurisdiction, encounters, which in his judgment would preclude safe and normal occupancy by clients on that day.

(2) (No change.)

(3) Copies of reduced size floor plans on an 8 1/2 inch by 11 inch sheet must be submitted in duplicate to DADS [~~DHS~~] for record or file [~~record/file~~] use and for the facility's use and for facility's use for evacuation plan, fire alarm zone identification, etc. The plan must contain basic legible information such as scale, room usage names, actual bedroom numbers, doors, windows, and any other pertinent information.

§98.42. Safety.

(a) Disaster plans. The facility must have a written plan with procedures to be followed in an internal or external disaster and for the care of casualties. The rules must address areas, such as: emergency evacuation transportation; adequate sheltering arrangements; supplies; staffing; emergency equipment; individual identification of clients [~~residents~~] and transfer of records; responding to family inquiries; and post-disaster activities, including emergency power, food, water, and transportation. Plans dealing with natural disasters, such as hurricanes, floods and tornadoes, must be coordinated with the local emergency management coordinator. Information about the local emergency management coordinator may be obtained from the office of the local mayor or county judge.

(b) Environmental safety.

(1) (No change.)

(2) The facility must conform to all applicable state laws and local ordinances pertaining to occupancy. When these laws, codes, and ordinances are more stringent than the standards in this section, the more stringent requirements govern. If state laws or local codes or ordinances conflict with the requirements of these standards, DADS' Regulatory Services Licensing and Credentialing Section [~~the Facility Enrollment~~] will be so informed so that these conflicts may be legally resolved.

(3) The facility must meet the provisions and requirements concerning accessibility for individuals with disabilities in the following laws and regulations: the Americans with Disabilities Act (ADA) of 1990 ([~~Public Law 101- 336;~~] Title 42, United States Code, Chapter 126); Title 28, Code of Federal Regulations, Part 35; Texas Government Code, Chapter 469, Elimination of Architectural Barriers [~~Texas Civil Statutes, Article 9102~~]; and 16 TAC [~~Title 16, Texas Administrative Code~~] , Chapter 68, Elimination of Architectural Barriers. Plans for new construction [~~construc- tion~~] , substantial renovations, modifications, and alterations must be submitted to the Texas Department of Licensing and Regulation (Attn: Elimination of Architectural Barriers Program) for accessibility approval under Texas Government Code, Chapter 469 [~~Article 9102~~]. At least 50% of the client restrooms must be in accordance with ADA. Exception: Facilities licensed for 45 or fewer persons may provide one unisex restroom in accordance with accessibility requirements.

(4) DADS' jurisdiction [~~The jurisdiction of the Texas Department of Human Services (DHS)~~] extends beyond the licensed facility when the licensed area is only a part of a building or floor that is not fire-separated in accordance with the Life Safety Code, NFPA 101, 2000 edition, §16.1.2, New Day-Care Centers, or Life Safety Code, NFPA 101, 2000 edition, §17.1.2, Existing Day-Care Centers with Mixed Occupancies [~~§10-7.1.2~~].

(c) Life Safety Code, NFPA 101, 2000 edition.

(1) The principles of the Life Safety Code, NFPA 101, 2000 [~~of the National Fire Protection Association (NFPA), 1988~~] edition, under Chapter 16 for new day-care centers or Chapter 17 for existing day-care centers, [~~§10-7 "Day Care Centers,"~~] and operating features under §16.7 or §17.7, [~~§31-3.4 "Day Care Centers,"~~] must be used in establishing life safety requirements for adult day care facilities, with the interpretation and exceptions as listed in paragraphs (2) and (3) of this subsection. Chapter 16 of the Life Safety Code, NFPA 101, 2000 edition, is applicable to new construction, conversions of existing unlicensed buildings, remodeling, and additions conducted after April 1, 2007. Chapter 17 of the Life Safety Code, NFPA 101, 2000 edition, is applicable to existing adult day-care facilities licensed before April 1, 2007. Life safety features and equipment installed in existing buildings that are now in excess of what is required by the Life Safety Code, NFPA 101, 2000 edition, for existing facilities must continue to be maintained or may be completely removed if prior approval is obtained from DADS.

(2) Interpretations of the Life Safety Code, NFPA 101, 2000 edition, chapters 16 and 17 [~~1988, §10-7~~] , are as follows:

(A) The principles of chapters 16 and 17 [§10-7] apply to any size facility requiring licensing with four or more clients or participants.

(B) The principles of §16.1.4.2 and §17.1.4.2 [§10-7.1.1.3] relating to a building or portion thereof used less than 24 hours per day to house more than three adults requiring care, maintenance, and supervision by other than a relative apply to all facilities requiring licensing. A client must be ambulatory or semi-ambulatory and must not be bedridden. A client must not exhibit behavior that is harmful to the client or others [children six years of age and over apply].

(C) The manual fire alarm system and automatic smoke detection system must be installed in accordance with NFPA 72 National Fire Alarm Code series and state fire marshal licensing requirements.

(D) All facilities must follow the Life Safety Code, NFPA 101, 2000 edition, chapters 16 or 17 [1988, §10-7] , including [but not limited to] the following:

(i) If a center is [Where centers are] located in a building containing mixed occupancies, the occupancies must be separated by one-hour fire barriers.

[(ii) Exit access corridors must be not less than six feet clear width.]

(ii) [(iii)] Each floor occupied by clients must have access to two remote exits in accordance with Chapter 7 [5], Means of Egress. Doors in the means of egress must be equipped with hardware that opens with a single motion. Doors must swing in the direction of egress for occupant loads greater than 50 occupants.

(iii) [(iv)] Every room or space normally subject to client occupancy, other than bathrooms or any room with attended individual clients, must have at least one outside window for emergency rescue or ventilation. Such window must be able to be opened from the inside without the use of tools and provide a clear opening of not less than 20 inches [in.] in width, 24 inches [. in.] in height, and 5.7 sq. ft. (821 sq. in.) in area (minimum width of 20 inches by 41.2 inches high and minimum height of 24 inches by 34.2 inches wide). The bottom of the opening must be not more than 44 inches [in.] (112 cm.) above the floor. In rooms located greater than three stories above grade, the openable clear height, width, and area of the window may be modified to the dimensions necessary for ventilation. Exceptions are [as follows] :

(I) [in] buildings protected throughout by an approved, supervised automatic sprinkler system in accordance with §9.7 [§7-7]; [or]

(II) rooms or spaces with [where the room or space has] a door leading directly to the outside of the building; or [.]

(III) in existing facilities, rooms smaller than 250 square feet.

(iv) [(v)] Interior finish in stairways, corridors, and lobbies must be Class A. All[, and for all] other walls and ceilings must be Class A or Class B interior finish in accordance with Life Safety Code, NFPA 101, 2000 edition, §10.2.3 [§6-5]. Flame spread is the rate of fire travel along the surface of a material. (This is different from other requirements for time-rated "burn through" resistance ratings such as one-hour rated.) Flame spread ratings are Class A (0-25), Class B (26-75), and Class C (76-200).

(v) [(vi)] Floor finish materials [coverings] within corridors and exits must be Class I or Class II in accordance with §10.2.7 in new construction or new installations of flooring. Replacement or newly installed floor finish materials must be Class I or II. Existing floor finish materials in good condition may remain in use in accordance with §10.2 [§6-5].

(vi) [(vii)] A smoke detection system must be installed in accordance with §9.6 [§7-6] with placement of detectors in each story in front of the doors to the stairways and [at not greater than 30 ft. (9.1 m.) spacing] in the corridors of all floors occupied by the day-care occupancy [containing the center]. Detectors also must be installed in lounges, recreation areas, dining areas, and sleeping rooms in the center. Maintenance and testing must be conducted semiannually [semi-annually] on fire alarm systems by a person licensed by the State of Texas. The facility must have a written contract with a fire alarm firm to perform the inspection, test, and maintenance requirements of NFPA 72 semiannually. The firm must have an Alarm Certificate of Registration number from the Texas State Fire Marshal's Office. Inspections stipulated to in the contract must actually be performed by the firm cited in the contract. The person performing the semiannual service must have an individual fire alarm license from the Texas State Fire Marshal's Office. A licensed individual must not perform the contract inspections, tests, and contracted maintenance unless the individual is an employee or agent of a registered firm. All other NFPA 72 requirements must be performed and documented by a licensed individual. Smoke detector sensitivity must be checked within one year after installation and every alternate year thereafter in accordance with NFPA 72. Documents, including as-built installation drawings, operation and maintenance manuals, and a written sequence of operation, must be available for examination by DADS.

(vii) [(viii)] Fire department notification must be accomplished in accordance with §9.6.4 [§7-6.4], except in day-care centers with not more than 100 clients.

(3) Exceptions to the Life Safety Code, NFPA 101, 2000 edition, chapters 16 or 17 [1988, §10-7], are as follows.

(A) (No change.)

(B) Reference to apartment buildings in §16.1.2 or §17.1.2 [§10-7.1.2] must be deleted. Any floor above or below the floor of exit discharge that [which] is used by semi-ambulatory [semiambulatory] clients, or those whose disability prevents them from taking appropriate action for self-preservation in emergencies, must be provided with smoke compartmentation.

(C) - (D) (No change.)

(E) NFPA 96, Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations, is [publication relating to Vapor Removal Cooking Equipment must] not [be] applicable if the facility has residential-type cooking equipment.

(F) (No change.)

(G) Residential-type heating units or heating units designed for attic installations must not be considered to be units requiring furnace room construction as specified under §16.3.2.1 or §17.3.2.1 [§10-7.3.2.1].

(H) (No change.)

(I) Sprinkler system for a janitor's closet as specified under §16.3.2.1 or §17.3.2.1 is [§10-7.2.2 are] not required unless the building has a complete NFPA 13 system.

(4) For new construction, DADS [DHS] requires conformance to the following codes, except that DADS [DHS] may accept other nationally recognized codes that are locally enforced.

(A) (No change.)

(B) In the absence of local municipal codes or ordinances, nationally recognized codes must be used, such as the International Building Code and the compatible International Codes published by the International Code Council [~~Standard Building Code and the Standard Plumbing Code, both of which are part of the Southern Building Code, published by Congress International, Inc~~]. These nationally recognized codes, when used, must all be publications of the same group or organization to assure the intended continuity.

(C) Heating, ventilating, and air-conditioning (HVAC) systems must be designed and installed in accordance with NFPA 90A[~~, relating to the Standard for the Installation of Air Conditioning and Ventilating Systems,~~] and NFPA 90B, [~~relating to the Standard for the Installation of Warm Air Heating and Air Conditioning Systems,~~] as applicable, and the American Society of Heating, Refrigerating [~~Ventilating~~], and Air-Conditioning [~~Air Conditioning~~] Engineers (ASHRAE), except as may be modified in this subchapter. Buildings required to meet NFPA 90A must have automatic shutdown upon initiation of the fire alarm system, in accordance with NFPA 90A, §4.4 [~~§4-3~~].

(D) Electrical and illumination systems must be designed and installed in accordance with NFPA 70[~~, relating to the National Electrical Code,~~] and the *Lighting Handbook* [~~Lighting Handbook~~] of the Illuminating Engineering Society (IES) of North America, except as may be modified in this subchapter. Minimum illumination must be 20 foot candles in the toilets, bathing, and general use areas such as living, dining, corridors, and lobbies. Minimum illumination must be 50 foot candles in the kitchen, medication or food preparation areas, and activity areas for handicrafts or reading.

(5) An existing building either occupied as an adult day care facility at the time of initial inspection by DADS [~~the licensing agency~~], or converted to occupancy as an adult day care facility, must meet all local requirements pertaining to the building for that occupancy. DADS [~~The licensing agency~~] may require the facility sponsor or licensee to submit evidence that local requirements are satisfied.

(6) Adult day care facilities must be of recognized permanent type construction as distinguished from movable buildings or construction. Buildings must be structurally sound with regard to actual or expected dead, live, and wind loads. DADS [~~DHS~~] may require submission of evidence to this effect. Foundations must be permanent, structurally sound for local soil conditions, and in good repair. A letter from a registered professional engineer may be required as validation of a permanent and structurally sound foundation. The walking surface must be consistent, nominally level, and without abrupt changes in elevation, trip hazards, or gaps. Floor surfaces may be on different elevations if connected with ramps or steps in accordance with the Life Safety Code, NFPA 101, 2000 edition, means of egress chapter.

(7) Electrical and mechanical systems must be safe and in working order. DADS [~~DHS~~] may require the facility sponsor or licensee to submit evidence to this effect, consisting of a report from the fire marshal or city or [~~and/or~~] county building official having jurisdiction or a report from a registered professional engineer.

(8) DADS [~~DHS~~] will consider a written request from the facility for a waiver of requirements which, if strictly applied, would clearly be impractical in DADS' [~~DHS's~~] judgment for existing buildings and structures that have been [~~which are~~] converted to adult day care occupancy. Any of these modifications will be allowed only to the extent that reasonable life safety against the hazards of fire, explosion, structural, or other building failure and panic are provided and maintained.

(d) Personal safety.

(1) Fire safety.

(A) Fire safety must be observed at all times.

(i) Fire drills must be conducted every month with all occupants of the building participating in the drills. Drills must be held at expected and unexpected times and under varying conditions to simulate the unusual conditions that can occur in an actual emergency. Drill participants must relocate to a predetermined location and remain at such location until a recall or dismissal signal is given. All fire drills must be documented on a form provided by DADS.

(ii) Fire prevention inspections must be conducted monthly by a trained senior member of the staff. The facility director or another staff member must inspect all exit facilities daily to ensure that all stairways, doors, and other exits are in proper condition. A copy of the latest inspection report must be posted in a conspicuous place in the facility. Copies of monthly inspection reports for the previous year must be maintained at the facility.

(iii) A copy of the annual fire marshal inspection by the local fire marshal must be available on site.

(B) Storage items must be neatly arranged and placed to minimize fire hazard. Gasoline, volatile materials, paint, and similar products must not be stored in the building housing clients unless approved by the local fire marshal. Accumulations of extraneous material and refuse are [~~is~~] not permitted.

(C) (No change.)

(D) The facility must report all fires, serious injuries, deaths, or disasters within 24 hours after the occurrence to DADS Consumer Rights and Services at 1-800-458-9858 [~~to DHS, Facility Enrollment, on DHS's Fire Report for Licensed Facilities form within 15 days after the fire. The facility must immediately notify DHS, Licensing Section, at (512) 438-2630 of disasters or any fires which caused death or serious injury~~]. A telephone report concerning fires must be followed by a written report on DADS' [~~DHS's~~] Fire Report form.

(E) The facility must develop and conspicuously post throughout the facility an emergency evacuation plan approved by the local fire marshal having jurisdiction and DADS [~~DHS~~].

(F) - (H) (No change.)

(I) An initial pressure test of facility gas lines from the meter must be provided. Additional pressure tests are required when the facility has major renovations or additions during which the gas service is interrupted. All gas heating systems must be checked for proper operation and safety before [~~prior to~~] the heating season by someone experienced in the areas of heating and air conditioning. Any unsatisfactory conditions must be corrected promptly.

(J) Curtains or [~~and/or~~] draperies in public spaces and individual rooms in which smoking is allowed must be flame retardant.

(K) Portable fire extinguishers must be provided and maintained to comply with the provisions of NFPA [~~the National Fire Protection Association (NFPA)~~] 10. This includes such items as type of extinguishers (A, B, or C), location and spacing, mounting heights, monthly inspections by staff, yearly inspections by a licensed agent (with any necessary servicing), and hydrostatic testing as recommended by the manufacturer.

(L) Metal wastebaskets of substantial gauge or any UL- [~~U.L.~~] or FM-approved [~~F.M. approved~~] containers must be provided in all areas where smoking is permitted. Garbage, waste, or trash containers provided for kitchens, janitor closets, laundries, mechanical or boiler rooms, general storage, and similar places must be made of metal or any UL- [~~U.L.~~] or FM-approved [~~F.M. approved~~] material, having a

close fitting cover. Disposable plastic liners may be used in these containers for sanitation.

(2) General requirements.

(A) - (F) (No change.)

(G) Licensure capacity will be calculated at 40 square feet per client. This space may not include the kitchen/food service area, rest rooms, bath areas, office, corridors, stairways, storage areas, and outdoor space. Facilities licensed before October 1, 2000, will be allowed to meet the requirements in effect before [~~prior to~~] October 1, 2000, of 35/50 square feet for ambulatory and semi-ambulatory [~~ambulatory/semiambulatory~~] clients. If a facility licensed before October 1, 2000, chooses to increase its capacity, changes ownership, or relocates, the facility will be required to meet the current standards for usable space, outdoor area, and rooms for privacy.

(H) - (I) (No change.)

(J) A separate room or rooms with beds must be provided for those clients who prefer privacy. Facilities licensed on or after May 1, 1999, must ensure that the room(s) with beds provide space for a minimum 5% [~~5.0%~~] of the licensed capacity. The usable space in the room(s) must provide not less than 80 square feet per bed for a one-bed room and not less than 60 square feet per bed for multiple-bed rooms. A bedroom shall be not less than eight feet in its smallest dimension, unless otherwise approved by DADS [~~DHS~~].

(K) The facility must have at least one room available as a treatment or [~~and/or~~] examination room for use by the nursing staff or the client's physician. The client may not be treated or [~~and/or~~] examined in an area other than the treatment room.

(L) The facility must have a safe, secure, and suitable outdoor recreation or [~~and/or~~] relaxation area for clients. This area must be connected to, be a part of, be controlled by, and be directly accessible from the facility. This area must be enclosed by a wall or a fence or located in a courtyard and supervised by staff to prevent wandering and large enough to conduct outdoor activities. A chain-link fence must provide protection on top to prevent injury from wire points. This area must be suitably furnished. A minimum of 20% of the required outdoor space must be shaded. The required outdoor space for facilities licensed on or after May 1, 1999 is:

(i) - (iii) (No change.)

§98.43. Sanitation.

(a) General.

(1) Wastewater [~~Waste water~~] and sewage must be discharged into a state-approved municipal sewage system; any exception such as an on-site sewage facility must be as approved by the Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality or authorized agent.

(2) The water supply must be from a system approved by the Public Drinking Water Section of the [~~Utility Division,~~] Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality, or from a system regulated by an entity responsible for water quality in that jurisdiction as approved by the Public Drinking Water Section of the [~~Utility Division,~~] Texas [~~Natural Resource Conservation~~] Commission on Environmental Quality.

(3) - (7) (No change.)

(8) There must be complete, separate, and adequate rest room facilities for men and women. Toilets must be provided as necessary to meet the needs of the clients; however, there must be not less than one toilet and one lavatory for every 15 clients or fraction thereof. A urinal may be substituted as the third required toilet in the men's bathroom. Multiple toilets must be compartmented. All toilets must be equipped with grab bars. Lavatories must be provided with hot and cold water, soap, and individual towels. A minimum of one bathing unit must be provided. Facilities licensed on or after May 1, 1999, must provide a minimum of one bathing unit that [~~,which~~] does not interfere with the use of the restroom by other clients. Each tub or shower must be in an individual room or enclosure that [~~which~~] provides space for the private use of the bathing fixture, for drying and dressing, and for the client and attendant.

(9) (No change.)

(10) In kitchens and laundries, there must be procedures that [~~which~~] prevent cross contamination between clean and soiled utensils and clean and soiled linens.

(b) Kitchen.

(1) The Department of State Health Services (DSHS) rules in 25 TAC §§229.161 - 229.171 and §§229.173 - 229.175 (relating to Texas Food Establishments) and local health ordinances or requirements must be observed in the storage, preparation, and distribution of food; in the cleaning of dishes, equipment, and work area; and in the storage and disposal of waste.

(2) (No change.)

(3) Food preparation kitchens must have separate hand-washing [~~hand washing~~] fixtures including hot and cold water, soap, and individual towels, preferably paper towels, in accordance with DSHS rules in 25 TAC §§229.161 - 229.171 and §§229.173 - 229.175 [~~(relating to Texas Food Establishments)~~].

(4) (No change.)

§98.44. Plans, Approvals, and Construction Procedures.

At the option of the applicant, DADS [~~the Texas Department of Human Services (DHS)~~] will review plans for new buildings, additions, conversion of buildings not licensed by DADS [~~DHS~~], or remodeling of existing licensed facilities. DADS [~~DHS~~] will, within 30 days, inform the applicant in writing of the results of the review. If the plans comply with DADS' [~~DHS's~~] architectural requirements, DADS [~~DHS~~] may not subsequently change the architectural requirement applicable to the project unless the change is required by federal law or the applicant fails to complete the project within two years. DADS [~~DHS~~] may grant a waiver of this two-year period for delays due to unusual circumstances. There is no time limit to complete a project, only a time limit for completing a project using requirements that have been revised after the project was reviewed.

(1) Submittal of plans.

(A) (No change.)

(B) Final copies of plans must have (in the reproduction process by which plans are reproduced) a title block that shows name of facility, person, or organization preparing the sheet, sheet numbers, facility address, and drawing date. Sheets and sections covering structural, electrical, mechanical, and sanitary engineering final plans, designs, and specifications must bear the seal of a registered professional engineer approved by the Texas [~~State~~] Board of [~~Registration for~~] Professional Engineers to operate in Texas. Contract documents for additions, remodeling, and construction of an entirely new facility must be prepared by an architect licensed by the Texas [~~State~~] Board of Architectural Examiners. Drawings must bear the seal of the architect.

(C) - (E) (No change.)

(F) The review of plans and specifications by DADS [~~DHS~~] is based on general utility, the minimum licensing standards, and conformance of the Life Safety Code, NFPA 101, 2000 edition,

and is not to be construed as all-inclusive approval of the structural, electrical, or mechanical components, nor does it include a review of building plans for compliance with the Texas Accessibility Standards as administered and enforced by the Texas Department of Licensing and Regulation.

(G) (No change.)

(2) Contract documents.

(A) Site plan documents must include:

(i) - (vii) (No change.)

(viii) unusual site conditions, such as:

(I) ditches;[,]

(II) low water levels;[,]

(III) other buildings on-site;[,] and

(IV) (No change.)

(B) - (E) (No change.)

(F) Elevations and roof plan must include:

(i) exterior elevations, including:

(I) material note indications; and

(II) (No change.)

(ii) roof slopes;[,]

(iii) drains;[,]

(iv) gas piping, etc.;[,] and

(v) (No change.)

(G) - (J) (No change.)

(K) Heating, ventilating, and air-conditioning systems (HVAC) documents must include:

(i) sufficient details of HVAC systems and components to assure a safe and properly operating installation, including [, but not limited to,] heating, ventilating, and air-conditioning layout, ducts, protection of duct inlets and outlets, combustion air, piping, exhausts, and duct smoke and/or fire dampers; and

(ii) (No change.)

(L) If applicable, sprinkler system documents must include:

(i) plans and details of NFPA [National Fire Protection Association (NFPA)] designed systems;

(ii) - (iii) (No change.)

(M) - (N) (No change.)

(3) Construction phase.

(A) DADS [DHS] must be notified in writing before construction starts.

(B) (No change.)

(4) Initial survey of completed construction.

(A) Upon completion of construction, including grounds and basic equipment and furnishings, a final construction inspection (initial survey) of the facility must be performed by DADS [DHS] before admitting clients. An initial architectural inspection will be scheduled after DADS [DHS] receives a notarized licensure application, required fee, fire marshal approval, and a letter from an architect or engineer stating that to the best of their knowledge the facility meets the architectural requirements for licensure.

(B) After the completed construction has been surveyed by DADS [DHS] and found acceptable, this information will be forwarded to DADS' Regulatory Services Licensing and Credentialing [the DHS Facility Enrollment] Section as part of the information needed to issue a license to the facility. In the case of additions or remodeling of existing facilities, a revision or modification to an existing license may be necessary. The building, including basic furnishings and operational needs, grades, drives, and parking, must essentially be 100% complete at the time of this initial visit for occupancy approval and licensing. A facility may accept up to three clients between the time it receives initial approval from DADS [DHS] and the time the license is issued.

(C) The following documents must be available to DADS' [DHS's] architectural inspecting surveyor at the time of the survey of the completed building:

(i) - (iii) (No change.)

(iv) approval of the completed sprinkler system installation by the Texas Department of Insurance or designing engineer, including a[. A] copy of the material list and test certification [must be available];

(v) - (vi) (No change.)

(vii) a written statement from an architect/engineer stating, to the best of his knowledge, the building was constructed in substantial compliance with the construction documents, the Life Safety Code, NFPA 101, 2000 edition, DADS [DHS] licensure standards, and local codes; and

(viii) (No change.)

(5) Nonapproval of new construction.

(A) If, during the initial on-site survey of completed construction, the surveyor finds certain basic requirements not met, DADS [DHS] may recommend the facility not be licensed and approved for occupancy. Such items may include the following:

(i) substantial changes made during construction that were not submitted to DADS [DHS] for review and that may require revised "as-built" drawings to cover the changes, including[. This may include] architectural, structural, mechanical, and electrical items as specified in paragraph (3)(B) of this section;

(ii) construction that does not meet minimum code or licensure standards, such as corridors that are less than required width, ceilings installed at less than the minimum seven-foot, six-inch height, client [resident] bedroom dimensions less than required, and other such features that would disrupt or otherwise adversely affect the clients and staff if corrected after occupancy;

(iii) (No change.)

(iv) fire protection systems, including [, but not limited to,] fire alarm systems, emergency power and lighting, and sprinkler systems, not completely installed or not functioning properly;

(v) required exits not all usable according to Life Safety Code, NFPA [National Fire Protection Association (NFPA)] 101, 2000 edition requirements;

(vi) - (viii) (No change.)

(B) (No change.)

(C) Copies of reduced-size floor plans on an 8 1/2-inch by 11-inch sheet must be submitted in duplicate to DADS [DHS] for

record or file [~~record/file~~] use and for the facility's use for evacuation plan, fire alarm zone identification, etc. The plan must contain basic legible information such as scale, room usage names, actual bedroom numbers, doors, windows, and any other pertinent information.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER E. INSPECTIONS, SURVEYS, AND VISITS

40 TAC §§98.81 - 98.84

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §§103.001 - 103.011 and 161.021.

§98.81. Procedural Requirements.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] may enter the premises of a facility at reasonable times and make an inspection necessary to issue a license or renew a license. DADS [~~DHS~~] inspection and survey personnel will perform inspections and surveys, follow-up visits, complaint investigations, investigations of abuse or neglect, and other contact visits as required for carrying out the responsibilities of licensing.

(b) - (c) (No change.)

(d) Certain visits may be announced, including [~~, but not limited to,~~] initial architectural inspections, visits to determine the progress of physical plant construction or repairs, equipment installation or repairs, systems installation or repairs, or conditions when certain emergencies arise, such as fire, windstorm, or malfunctioning or nonfunctioning of electrical or mechanical systems.

(e) Any person may request an inspection of a facility by notifying DADS [~~DHS~~] in writing of an alleged violation of a licensing requirement. The complaint shall be as detailed as possible and signed by the complainant. DADS performs [~~DHS shall perform~~] an on-site inspection as soon as feasible but no later than 30 days after receiving the complaint, unless after an investigation the complaint is found to be frivolous. DADS [~~DHS~~] will respond to the complainant in writing.

(f) DADS [~~DHS~~] will receive and investigate anonymous complaints.

(g) The facility must make all of its books, records, and other documents maintained by or on behalf of a facility accessible to DADS [~~DHS~~] upon request.

(1) DADS [~~DHS~~] is authorized to photocopy documents, photograph clients [~~residents~~], and use any other available recording devices to preserve all relevant evidence of conditions found during an inspection, survey, or investigation that DADS [~~DHS~~] reasonably believes threaten the health and safety of a client.

(2) Examples of records and documents that [~~which~~] may be requested and photocopied or otherwise reproduced are client medical records, including nursing notes, pharmacy records, medication records, and physician's orders.

(3) The facility may charge DADS [~~DHS~~] at a rate not to exceed the rate DADS [~~DHS~~] charges for copies. The procedure of copying is the responsibility of the director or his designee. If copying requires that the records be removed from the facility, a representative of the facility is expected to accompany the records and assure their order and preservation.

(4) DADS [~~DHS~~] protects the copies for privacy and confidentiality in accordance with recognized standards of medical records practice, applicable state laws, and DADS [~~DHS~~] policy.

(h) (No change.)

§98.82. Determinations and Actions Pursuant to Inspections.

(a) DADS determines [~~The Texas Department of Human Services (DHS) will determine~~] if a facility meets the licensing rules, including both physical plant and facility operation requirements.

(b) (No change.)

(c) At the conclusion of an inspection or survey, the violations are discussed in an exit conference with the facility's management. A written list of the violations is left with the facility at the time of the exit conference; any additional violation that may be determined during review of field notes or preparation of the official final list (when the official final list was not issued at the exit conference) is communicated to the facility in writing within 10 [~~ten~~] workdays after [~~of~~] the exit conference. Copies of any narratives or similar papers written to further describe the conditions are furnished to the facility.

(d) (No change.)

(e) A clear and concise summary in nontechnical language of each licensure inspection, inspection of care, and [~~and/or~~] complaint investigation, if applicable, is provided by DADS [~~DHS~~]. That summary outlines significant violations noted at the time of the visit, but does not include names of clients, staff, or any other statement that would identify individual clients or other prohibited information under general rules of public disclosure. The summary is provided to the facility at the time the report of contact or similar document is provided.

(f) Upon receipt of the final statement of deficiencies, the facility will have 10 [~~calendar~~] days to submit an acceptable plan of correction to the DADS Regulatory Services [~~Long Term Care Regulatory~~] regional director.

(g) If the provider and the inspector cannot resolve a dispute regarding a violation of regulations, the provider is entitled to an information dispute resolution (IDR) at the regional level for all violations. For a violation which resulted in an adverse action, the provider is entitled to an IDR at either the regional or state office level.

(1) A written request and all supporting documentation must be submitted to the Regional Director, Regulatory Services [~~Long Term Care-Regulatory~~], for a regional IDR or to Regulatory Services [~~Long Term Care-Regulatory~~], Texas Department of Aging and Disability Services [~~Human Services (DHS)~~], P.O. Box 149030, E-351 [~~(E-343)~~], Austin, Texas 78714-9030, for a central office IDR, no later than the tenth [~~calendar~~] day after receipt of the official statement of violations.

(2) DADS [~~DHS~~] will complete the IDR process no later than the 30th [~~calendar~~] day after receipt of a request from a facility.

(3) Violations deemed invalid in an IDR will be so noted in DADS' [~~DHS's~~] records.

§98.83. Referrals to the Attorney General.

DADS [~~The Texas Department of Human Services (DHS)~~] may refer a facility to the attorney general who may petition a district court for:

(1) a temporary restraining order to restrain a person from a violation or threatened violation of the requirements or any other law affecting clients if DADS [~~DHS~~] reasonably believes that the violation or threatened violation creates an immediate threat to the health and safety of a client; and

(2) an injunction to restrain a person from a violation or threatened violation of the requirements or any other law affecting clients if DADS [~~DHS~~] reasonably believes that the violation or threatened violation creates a threat to the health and safety of a client.

§98.84. Procedures for Inspection of Public Records.

(a) (No change.)

(b) DADS' Regulatory Services Division [~~The Long Term Care-Regulatory, Texas Department of Human Services (DHS),~~] is responsible for the maintenance and release of records on licensed facilities, and other related records.

(c) The application for inspection of public records is subject to the following criteria.

(1) The application must be made to Regulatory Services [~~the Long Term Care-Regulatory~~], Texas Department of Aging and Disability Services [~~Human Services~~], Mail Code E-349, P.O. Box 149030, Austin, Texas 78714-9030.

(2) - (4) (No change.)

(5) On written applications, if DADS [~~DHS~~] is unable to ascertain the records being requested, DADS [~~DHS~~] may return the written application to the requester for clarification.

(6) DADS [~~DHS~~] will provide the requested records as soon as possible; however, if the records are in active use, or in storage, or time is needed for proper de-identification [~~deidentification~~] or preparation of the records for inspection, DADS [~~DHS~~] will so advise the requester and set an hour and date within a reasonable time when the records will be available.

(d) Original records may be inspected or copied, but in no instance will original records be removed from DADS [~~DHS~~] offices.

(e) Regulatory Services [~~Long Term Care-Regulatory~~] will charge for copies of records upon request.

(1) If the requester simply wants to inspect records, the requester will specify the records to be inspected. DADS [~~DHS~~] will make no charge for this service, unless the director of Regulatory Services [~~Long Term Care-Regulatory~~] determines a charge is appropriate based on the nature of the request.

(2) If the requester wants copies of a record, the requester will specify in writing the records to be copied on an appropriate DADS [~~DHS~~] form, and DADS [~~DHS~~] will complete the form by specifying the cost of the records, which the requester must pay in advance. Checks and other instruments of payment must be made payable to the Department of Aging and Disability Services [~~the Texas Department of Human Services~~].

(3) Any expenses for standard-size copies incurred in the reproduction, preparation, or retrieval of records must be borne by the requester on a cost basis in accordance with costs established by the Office of the Attorney General [~~State Purchasing and General Services Commission~~] or DADS [~~DHS~~] for office machine copies.

(4) For documents that are mailed, DADS [~~DHS~~] will charge for the postage at the time it charges for the production. All applicable sales taxes will be added to the cost of copying records.

(5) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. ABUSE, NEGLECT, AND EXPLOITATION: COMPLAINT AND INCIDENT REPORTS AND INVESTIGATIONS

40 TAC §§98.92 - 98.95

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §§103.001 - 103.011 and 161.021.

§98.92. Abuse, Neglect, or Exploitation Reportable to DADS [~~the Texas Department of Human Services (DHS)~~]by Facilities.

(a) Any facility staff who has reasonable cause to believe that a client is in a state of abuse, neglect, or exploitation must report the abuse, neglect, or exploitation to DADS [~~DHS's~~] state office at 1-800-458-9858 and must follow the facility's internal policies regarding abuse, neglect, or exploitation.

(b) The following information must be reported to DADS [~~DHS~~]:

(1) name, age, and address of the client [~~resident~~];

(2) - (5) (No change.)

(c) The facility must investigate the alleged abuse, neglect, or exploitation and send a written report of the investigation to DADS [~~DHS's~~] state office no later than the fifth [~~calendar~~] day after the oral report and be available for inspection by DADS [~~DHS~~].

§98.93. Complaint Investigation.

(a) A complaint is any allegation received by DADS [~~the Texas Department of Human Services (DHS)~~] regarding abuse, neglect, or exploitation of a client, or a violation of state standards.

(b) DADS [~~DHS~~] must give the facility notification of the complaint received and a summary of the complaint, without identifying the source of the complaint.

§98.94. Investigations of Complaints.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] only investigates complaints of abuse, neglect, or exploitation when the act occurs in the facility, when the licensed facility is responsible for the supervision of the client at the time the act occurs, or when the alleged perpetrator is affiliated with the facility. Other complaints of abuse, neglect, or exploitation not meeting this criteria must be referred to the [~~Texas~~] Department of Family and Protective [~~and Regulatory~~] Services.

(b) Complaint investigations must include a visit to the facility and consultation with persons thought to have knowledge of the circumstances. If the facility fails to admit DADS [~~DHS~~] staff for a complaint investigation, DADS [~~DHS~~] will seek a probate or county court order for admission. Investigators may request of the court that a peace officer accompany them.

(c) In cases concluded to be physical abuse, the written report of the investigation by DADS [~~DHS~~] must be submitted to the appropriate law enforcement agency.

(d) In cases concluded to be abuse, neglect, or exploitation of a client [~~resident~~] with a guardian, the written report of the investigation by DADS [~~DHS~~] must be submitted to the probate or county court that [~~which~~] oversees the guardianship.

§98.95. Confidentiality.

All reports, records, communications, and working papers used or developed by DADS [~~the Texas Department of Human Services (DHS)~~] in an investigation are confidential and may be released only as provided in this section.

(1) The final written investigation report on cases may be furnished to the district attorney and appropriate law enforcement agencies if the investigation reveals abuse that is a criminal offense. DADS [~~DHS~~] may provide to another state agency or governmental entity information that is necessary for DADS [~~DHS~~], state agency, or entity to properly execute its duties and responsibilities to provide services to the elderly or disabled.

(2) The final written investigation report may be released to the public upon request provided the report is de-identified to remove all names and other personally identifiable data, including any information from witnesses and other person furnished to DADS [~~DHS~~] as part of the investigation.

(3) The reporter and the facility will be notified of the results of DADS' [~~DHS's~~] investigation of a reported case of abuse, neglect, or exploitation, whether DADS [~~DHS~~] concluded that abuse, neglect, or exploitation occurred or did not occur.

(4) Upon written request of the person who is the subject of the report of abuse, neglect, or exploitation or his legal representative, DADS [~~DHS~~] shall release to the person or his legal representative otherwise confidential information relating to the final report. The request must specify the information desired and be signed and dated by the individual or his legal representative. The legal representative of a deceased person may make a written request for this information. The legal representative of a deceased person must also specify the reason the information is requested. Any legal representative must include with the request sufficient documentation to establish his authority. DADS [~~DHS~~] shall edit the information before release to protect the confidentiality of information related to the reporter's identify and to protect any other individual whose safety or welfare may be endangered by disclosure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER G. ENFORCEMENT

40 TAC §§98.102 - 98.104

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §§103.001 - 103.011 and 161.021.

§98.102. Nonemergency Suspension.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] may suspend a facility's license when the facility's violation of the licensure rules threatens to jeopardize the health and safety of clients.

(b) Suspension of a license may occur simultaneously with any other enforcement provision available to DADS [~~DHS~~].

(c) The facility will be notified by certified mail of DADS' [~~DHS's~~] intent to suspend the license, including the facts or conduct alleged to warrant the suspension. The facility has an opportunity to show compliance with all requirements of law for the retention of the license as provided in §98.20 of this title (relating to Opportunity to Show Compliance [~~Informal Reconsideration~~]). If the facility requests an opportunity to show compliance [~~informal reconsideration~~], DADS [~~DHS~~] will give the license holder a written affirmation or reversal of the proposed action.

(d) The facility will be notified by certified mail of DADS' [~~DHS's~~] suspension of the facility's license. If DADS suspends a facility's license, the licensee may request a formal appeal by following the Health and Human Services Commission's formal hearing procedures in 1 TAC Chapter 357, Subchapter I. A formal administrative hearing is conducted in accordance with Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I. [~~The facility has 15 days from receipt of the certified mail notice to request a hearing in accordance with Chapter 79 of this title, Subchapter Q (relating to Formal Appeals).~~] The suspension will take effect when the deadline for appeal of the suspension passes, unless the facility appeals the suspension. If the facility appeals the suspension, the status of the license holder is preserved until final disposition of the contested matter.

(e) The suspension will remain in effect until DADS [~~DHS~~] determines that the reason for suspension no longer exists. A suspension may last no longer than the term of the license. DADS [~~DHS~~] will conduct an on-site investigation before [~~prior to~~] making a determination. During the suspension, the license holder must return the license to DADS [~~DHS~~].

§98.103. Revocation.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] may revoke a facility's license when the license holder has violated the requirements of the Texas Human Resources Code, Chapter 103.

(b) In addition, DADS [~~DHS~~] may revoke a license if the licensee:

(1) - (3) (No change.)

(4) violated the requirements of the Texas Human Resources Code, Chapter 103, or the rules adopted under this chapter [~~Human Resources Code Chapter 103~~].

(c) Revocation of a license may occur simultaneously with any other enforcement provision available to DADS [~~DHS~~].

(d) The facility will be notified by certified mail of DADS' [~~DHS's~~] intent to revoke the license, including the facts or conduct alleged to warrant the revocation. The facility has an opportunity to show compliance with all requirements of law for the retention of the license as provided in §98.20 of this title (relating to Opportunity to Show Compliance [~~Informal Reconsideration~~]). If the facility requests an opportunity to show compliance [~~informal reconsideration~~], DADS [~~DHS~~] will give the license holder a written affirmation or reversal of the proposed action.

(e) If DADS revokes a facility's license, the licensee may request a formal appeal by following the Health and Human Services Commission's formal hearing procedures in 1 TAC Chapter 357, Subchapter I. A formal administrative hearing is conducted in accordance with the formal hearing procedures in 1 TAC Chapter 357, Subchapter I. [~~The facility has 15 calendar days from receipt of the certified mail notice to request a hearing in accordance with Chapter 79 of this title, Subchapter Q (relating to Formal Appeals).~~] If the facility appeals the revocation, the status of the license holder is preserved until final disposition of the contested matter.

§98.104. Emergency Suspension and Closing Order.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] will suspend a facility's license or order an immediate closing of part of the facility if:

(1) DADS [~~DHS~~] finds that the facility is operating in violation of the licensure rules; and

(2) the violation creates an immediate threat to the health and safety of a client [~~resident~~].

(b) - (c) (No change.)

(d) A licensee whose facility is closed under this section is entitled to request a formal administrative hearing under the Health and Human Services Commission's formal hearing procedures in 1 TAC Chapter 357, Subchapter I [~~an administrative hearing in accordance with Chapter 79, Subchapter Q of this title (relating to Formal Appeals)~~], but a request for an administrative hearing does not suspend the effectiveness of the order.

(e) When an emergency suspension has been ordered and the conditions in the facility indicate that clients should be relocated, the following apply:

(1) (No change.)

(2) If a facility or part thereof is closed, the following procedures must be followed:

(A) DADS [~~DHS~~] will notify the local health department director, city or county health authority, and representatives of the appropriate state agencies of the closure.

(B) - (C) (No change.)

(D) DADS [~~DHS~~] will arrange for relocation to other facilities in the area in accordance with the client's preference. A facility chosen for relocation must be in good standing with DADS [~~DHS~~] and, if certified under Titles XVIII and XIX of the United States Social Security Act, must be in good standing under its contract. The facility chosen must be able to meet the needs of the client.

(E) If absolutely necessary, to prevent transport over substantial distances, DADS [~~DHS~~] will grant a waiver to a receiving facility to temporarily exceed its licensed capacity, provided the health and safety of clients is not compromised and the facility can meet the increased demands for direct care personnel and dietary services. A facility may exceed its licensed capacity under these circumstances, monitored by DADS [~~DHS~~] staff, until clients can be transferred to a permanent location.

(F) - (G) (No change.)

(H) Any return to the facility must be treated as a new admission, including [~~, but not limited to,~~] exchange of medical information, medications, and completion of required forms.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. DAY ACTIVITY AND HEALTH SERVICES (DAHS) CONTRACTUAL REQUIREMENTS

40 TAC §§98.202 - 98.212

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§98.202. Program Overview.

(a) A DAHS [~~Day Activity and Health Services (DAHS)~~] facility must:

(1) contract with DADS [~~the Texas Department of Human Services (DHS)~~] to provide day activity and health services (DAHS);

(2) (No change.)

(3) serve eligible clients, unless a DAHS facility is at licensed capacity;

(4) participate in the Child and Adult Care Food Program (CACFP). The DAHS facility must submit documentation of participation in the CACFP to DADS [~~DHS~~]. Documentation consists of a copy of the CACFP agreement or [~~and/or~~] a copy of the approval letter for participation in the CACFP, or both;

(5) advise the individual of his rights in a language he understands and provide him with a signed copy. The DAHS facility must maintain the original in the record; and

(6) comply with complaint procedures in community services [~~care~~] generic contracting rules §49.18(a)(4) and §49.18(b) - (c) [~~§49.13(a)(4)~~] of this title (relating to Client Rights and Responsibilities) [~~and §49.13(b) - (c) of this title (relating to Client Rights and Responsibilities)~~], and §49.17 [~~§49.14~~] of this title (relating to Complaint Procedures).

(b) DADS [~~DHS~~] reserves the right to deny any DAHS facility a contract if it is not in the best interest of DADS [~~DHS~~].

§98.203. Written Referrals for Services.

(a) DAHS [~~Day activity and health services (DAHS)~~] facilities receive written referrals from caseworkers based on the following priorities:

(1) - (3) (No change.)

(b) When a DAHS facility receives a referral from the caseworker, the DAHS facility nurse must make every effort to request prior approval for the client within 14 days after [~~of~~] the referral date on DADS' [~~the Texas Department of Human Services' (DHS's)~~] authorization for community care services form.

(c) If the DAHS facility cannot request prior approval within 14 days, the DAHS facility must notify the caseworker about the reason for delay. This notification must be sent on DADS' [~~DHS's~~] Case Information form within 14 days after [~~of~~] the referral date.

(d) Within the same 14 days after [~~of~~] receipt of DADS' [~~DHS's~~] authorization for community care services form from the caseworker and before requesting prior approval, the nurse must conduct a health assessment/plan of care with the client, using DADS' [~~DHS's~~] Client Health Assessment/Plan of Care form. If the client is unable to participate due to cognitive impairment, the client's responsible party should participate.

(e) If the nurse cannot conduct the health assessment within 14 days after [~~of~~] the referral date, the DAHS facility must notify the caseworker about the reason for delay on DADS' [~~DHS's~~] Case Information form within the 14-day period.

(f) Within the same 14 days after [~~of~~] receipt of DADS' [~~DHS's~~] authorization for community care services form from the caseworker, the nurse must obtain a physician's order for the client by sending DADS' [~~DHS's~~] Physician's Order for Day Activity and Health Services form to the client's physician. The nurse sends a copy of DADS' [~~DHS's~~] Client Health Assessment/Plan of Care form to the physician.

(g) If the DAHS facility cannot obtain physician's orders within 14 days after [~~of~~] the referral date, the DAHS facility must notify the caseworker about the reason for delay. The notification must be sent on DADS' [~~DHS's~~] Case Information form within the 14-day period. DADS' [~~DHS's~~] Case Information form must include the date of the health assessment/plan of care and must be dated after the health assessment/plan of care date, if one has been conducted.

(h) If the physician fails to date DADS' [~~DHS's~~] Physician's Order for Day Activity and Health Services form or if the signature date is illegible, the DAHS facility stamp-in date will be considered the date of the physician's order. The date stamp must include the day, month, year, and the name of the DAHS facility. An abbreviated name or initials are acceptable.

§98.204. DAHS Facility-Initiated Referrals.

(a) The applicant may be admitted to a day activity and health services DAHS facility as soon as verbal physician's orders are obtained if he appears to:

(1) (No change.)

(2) meet the medical/functional need criteria based on the information collected on DADS' [~~the Texas Department of Human Services' (DHS's)~~] Client Health Assessment/Plan of Care form.

(b) When a DAHS facility initiates a referral:

(1) the DAHS facility interviews the applicant to determine whether he appears to be Medicaid eligible. The DAHS facility determines Medicaid eligibility by reviewing the information on the applicant's Medical Care Identification Card;

(2) the nurse:

(A) conducts a health assessment/plan of care to determine whether the applicant appears to have a medical need for the service. The nurse determines medical need by completing DADS' [~~DHS's~~] Client Health Assessment/Plan of Care form; and

(B) (No change.)

(3) the DAHS facility verbally notifies the DADS [~~DHS~~] caseworker or intake unit of the placement the day the applicant contacts the DAHS facility. The DAHS facility follows up the notification in writing within seven days using DADS' [~~DHS's~~] Case Information form. This verbal notification is a request for community [~~care for aged and disabled (CCAD)~~] services and supports.

(c) The DAHS facility must request written prior approval for the applicant from the regional nurse within 30 days after [~~from~~] the date of the physician orders.

(d) If the DAHS facility fails to submit prior approval forms or additional documentation within required time frames, if the additional documentation is not adequate, or if the applicant is determined ineligible by the DADS [~~DHS~~] caseworker, the regional nurse cancels the DAHS facility-initiated prior approval and the DAHS facility is not reimbursed for services.

(e) If DADS' [~~DHS's~~] Client Health Assessment/Plan of Care form or Physician's Order for Day Activity and Health Services form is missing, or if any of the critical omissions or errors stated in paragraphs (1) - (9) of this subsection have occurred in the required documentation, the DAHS facility cannot obtain prior approval.

(1) The nurse fails to sign or date DADS' [~~DHS's~~] Client Health Assessment/Plan of Care form or omits the registered nurse/licensed vocational nurse credentials that should follow his signature.

(2) Documentation on DADS' [~~DHS's~~] Client Health Assessment/Plan of Care form does not support the medical eligibility criteria specified in §98.201 of this title (relating to Eligibility Requirements for Participation).

(3) Items A, B, in Sections II and III of DADS' [~~DHS's~~] Client Health Assessment/Plan of Care form are not completed or completed incorrectly and medical need cannot be determined.

(4) DADS' [~~DHS's~~] Physician's Order for Day Activity and Health Services form does not include the MD or DO credential of the physician who signed the form.

(5) DADS' [~~DHS's~~] Physician's Order for Day Activity and Health Services form does not include the license number of the physician who signed it.

(6) (No change.)

(7) The physician's signature is not on DADS' [~~DHS's~~] Physician's Order for Day Activity and Health Services form.

(8) The physician's signature date is missing or illegible and the DAHS facility's stamped date is missing from DADS' [~~DHS's~~] Physician's Order for Day Activity and Health Services form.

(9) The DAHS facility's stamped date used instead of the physician's date on DADS' [~~DHS's~~] Physician's Order for Day Activity and Health Services form does not include the provider agency's name, abbreviated name, or initials.

§98.205. Initiation of Services.

(a) The DAHS facility must initiate services within seven days after [~~of~~] the beginning date of coverage in Item 4 of DADS' [~~the Texas Department of Human Services' (DHS's)~~] Authorization for Community Care Services.

(b) If the DAHS facility does not initiate services within the seven-day period, the DAHS facility must notify the caseworker, using DADS' [~~DHS's~~] Case Information form, by the eighth day after the beginning date of coverage in Item 4 of DADS' [~~DHS's~~] Authorization for Community Care Services. DADS' [~~DHS's~~] Case Information form must include the reasons for the delay and the date when services are scheduled to begin.

(c) The DAHS facility must complete and return DADS' [~~DHS's~~] authorization for community [~~care~~] services form to the caseworker within 14 days after [~~from~~] the beginning date of coverage in Item 4 of DADS' [~~DHS's~~] authorization for community care services form. The DAHS facility must indicate the date services were initiated, the schedule for delivering services, and the total units authorized for the client.

§98.206. Program Requirements.

The DAHS facility must provide services that include the following [~~but are not limited to~~]:

(1) Nursing services. Nursing services must include:

(A) (No change.)

(B) assisting the client to order, maintain, or administer prescribed medications or treatments, as indicated by physician's orders;

(C) - (D) (No change.)

(2) (No change.)

(3) Nutrition/food service. Nutrition/food service in DAHS facilities is provided under 1 TAC Chapter 378, Subchapter A, concerning [~~Chapter 12, Subchapter A of this title (relating to~~] the Child and Adult Care Food Program (CACFP)[~~)~~] and must include:

(A) - (E) (No change.)

(4) (No change.)

(5) Transportation services in DAHS facilities.

(A) Transportation services must include:

(i) transportation to and from the DAHS facility; and

(ii) transportation to and from a DAHS facility approved to provide therapies, if the client requires specialized services on days of attendance at the day activity and health services DAHS facility.

(B) If the DAHS facility provides transportation for a client to a non-therapy medical DAHS facility, the DAHS facility can claim the time spent in transport as part of the unit of services.

(C) If the DAHS facility does not provide transportation, the DAHS facility must coordinate transportation with other resources.

(D) (No change.)

§98.207. Suspension of Day Activity and Health Services.

(a) The DAHS facility must suspend services before the end of the prior approval period if one or more of the circumstances specified in paragraphs (1) - (10) of this subsection occur:

(1) the client leaves the state or moves outside the geographic area served by the DAHS facility;

(2) - (5) (No change.)

(6) the Health and Human Services Commission (HHSC) [~~DHS~~] denies the client's Medicaid/Title XX eligibility;

(7) DADS [~~DHS~~] enforces sanctions against the DAHS facility by terminating the contract;

(8) (No change.)

(9) the client is absent from the DAHS facility for 15 consecutive days;

(10) the client becomes ineligible for Medicaid. Each month the DAHS facility must verify that a client has a current HHSC [~~Texas Department of Human Services (DHS)~~] Medical Care Identification Card.

(b) No later than the first DADS [~~DHS~~] workday after services are suspended, the DAHS facility must verbally notify the caseworker or staff in the caseworker's office about the reason the DAHS facility suspended services. Written notification on DADS' [~~DHS's~~] Case Information form must be sent to the caseworker within seven workdays after [~~work days of~~] the incident that was reported verbally.

§98.208. Notifications.

(a) If a client becomes ill or injured at the DAHS facility, the director/nurse must notify a relative or other responsible person the same day of the occurrence. Clients with communicable diseases cannot attend the DAHS facility until the physician has released the client. Examples of communicable disease are lice and scabies.

(b) No later than the first DADS [~~Texas Department of Human Services (DHS)~~] workday after becoming aware of changes in the client's status or condition, the DAHS facility must verbally notify the caseworker or staff in the caseworker's office about any change that may require a change in the client's plan of care, units, or service termination. The DAHS facility must follow up this verbal notification in writing, to the caseworker, using DADS' [~~DHS's~~] Case Information form. Written notification must occur within seven days after verbal notification.

(c) If a client is absent from a regularly scheduled program, DAHS facility staff must contact the client or someone knowledgeable about his condition the same day that the absence occurs. If DAHS facility staff are unable to contact the client or someone knowledgeable about his condition, staff document this in the client's record.

(d) The DAHS facility must verbally notify DADS [~~DHS~~] by the next DADS [~~DHS~~] workday and in writing within seven days after [~~of~~] verbal notification of the following changes in DAHS facility operations:

(1) - (3) (No change.)

§98.209. Record Maintenance.

(a) Personnel records. The DAHS facility must keep personnel records in a central location in the DAHS facility. Personnel records include staff qualifications, performance reports, attendance, and staff development records. The DAHS facility must maintain these documents and records according to the retention requirements. The DAHS facility must document staff coverage for days when regular staff are away from the DAHS facility on sick or vacation leave.

(b) Attendance records. The DAHS facility must use DADS [~~DHS~~] forms to maintain a daily record of attendance and transportation to and from the DAHS facility, including the time each client began receiving services and the time he left the DAHS facility's care. If transportation is provided by the DAHS facility, driver's transportation records must be used. Arrival and departure times must be documented for clients not using DAHS facility-provided transportation.

(c) Transportation records. The DAHS facility driver must maintain accurate daily transportation and mileage records, and records of expenses for purchase of gas and oil.

§98.210. Administrative Errors and Corrections.

(a) Administrative errors include[~~, but are not limited to,~~] the following:

(1) The DAHS facility enters a date of signature on DADS' [~~the Texas Department of Human Services' (DHS's)~~] Daily Attendance Record form that is before the date of the last day services are provided. DADS [~~DHS~~] applies the error to the total number of units reimbursed after the signature date.

(2) The DAHS facility fails to sign DADS' [~~DHS's~~] Daily Attendance Record form and the signature can be verified on DADS' [~~DHS's~~] Daily Transportation Record form. DADS [~~DHS~~] applies the error to the total number of units reimbursed on the unsigned form.

(3) The DAHS facility fails to list the client on DADS' [~~DHS's~~] Daily Attendance Record form, but the client was listed on DADS' [~~DHS's~~] Daily Transportation Record form. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the period the client was left off the attendance record form.

(4) The DAHS facility completes the total units of service column and leaves the time in and time out columns blank on DADS' [~~DHS's~~] Daily Attendance Record form, but the time in and time out can be verified on DADS' [~~DHS's~~] Daily Transportation Record form. DADS [~~DHS~~] applies the error to the total number of units reimbursed in which the time in time out days were left blank.

(5) The DAHS facility leaves the days of service blank on DADS' [~~DHS's~~] Daily Attendance Record form, but the days of service can be verified elsewhere on the form or on DADS' [~~DHS's~~] Daily Transportation Record form. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the days left blank.

(6) The DAHS facility fails to enter a date of signature on DADS' [~~DHS's~~] Daily Attendance Record form to certify total number of units provided to the client. DADS [~~DHS~~] applies the error to the total number of units reimbursed on the undated form.

(7) The DAHS facility corrects the date of signature on DADS' [~~DHS's~~] Daily Attendance Record form, but fails to initial the correction. DADS [~~DHS~~] applies the error to the number of units reimbursed after the earliest signature date.

(8) The DAHS facility uses a signature stamp, but fails to initial the stamped signature. DADS [~~DHS~~] applies the error to the total number of units reimbursed on the signature stamped form.

(9) The DAHS facility makes an illegible entry or illegible correction to any portion of record of time of DADS' [~~DHS's~~] Daily Attendance or Daily Transportation Record form. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the days in which entries are illegible.

(10) The DAHS facility completes DADS' [~~DHS's~~] Daily Attendance or Daily Transportation Record form in pencil. DADS [~~DHS~~] applies the error to the total number of units reimbursed that were completed in pencil.

(11) The DAHS facility uses liquid paper or correction fluid to correct an entry in DADS' [~~DHS's~~] Daily Attendance or Daily Transportation Record form. DADS [~~DHS~~] applies the error to the total number of units reimbursed that were corrected for the billing period.

(b) In the absence of acceptable secondary documentation, financial errors include[, ~~but are not limited to,~~] the errors specified in paragraphs (1) - (3) of this subsection.

(1) The DAHS facility is reimbursed for services, but DADS' [~~DHS's~~] Daily Attendance and Daily Transportation Record form is missing for the period for which services are reimbursed. DADS [~~DHS~~] applies the error to the total number of units reimbursed for the billing period.

(2) The DAHS facility is reimbursed for units that exceed the units recorded on DADS' [~~DHS's~~] Daily Attendance and Daily Transportation Record form. DADS [~~DHS~~] applies the error to the total number of units reimbursed in excess of the units recorded.

(3) The DAHS facility is reimbursed for units of service and the client did not receive services or was Medicaid ineligible (not applicable to Title XX clients). DADS [~~DHS~~] applies the error to the total number of units reimbursed for the days the client did not receive services or was Medicaid ineligible.

(c) Corrections of critical omissions or errors in DAHS facility documentation must be postmarked or date stamped as received by DADS [~~DHS~~] within 14 days after the regional nurse mails DADS' [~~DHS's~~] Notification of Critical Omissions/Errors in Required Documentation form to the DAHS facility. If the DAHS facility fails to meet this time frame;

(1) the date of prior approval can be no earlier than the postmark or DADS-stamped [~~DHS-stamped~~] date on the corrected documentation; or,

(2) DADS [~~DHS~~] may refer the client to another DAHS facility of the client's choice.

(A) If there is space in another DAHS facility, the regional nurse notifies the caseworker by the next workday to give the client or client's family/representative the option to be referred to another DAHS facility.

(B) The caseworker will contact the client within three workdays after [~~of~~] being notified by the regional nurse and refers the client to another DAHS facility, if the client or the client's family/representative prefers this option.

(d) (No change.)

§98.211. Billing and Payment.

(a) The method of payment is a unit of authorized service and is defined as half a day. One unit of service constitutes three hours but less than six hours of covered services provided by the DAHS facility. Six hours or more of service constitutes two units of service. Time spent in approved transportation provided by the DAHS facility shall be counted in the unit of service.

(b) The DAHS facility is not entitled to payment if:

(1) the DAHS facility fails to submit prior approval forms or supporting documentation to the regional nurse within the required time frames for DAHS facility initiated referrals;

(2) the DAHS facility did not maintain the staff-client ratio for one or more days;

(3) the DAHS facility exceeded its license capacity; or

(4) the DAHS facility's monthly claims do not correspond to the DAHS facility's service authorizations and DADS' [~~DHS's~~] Daily Attendance/Daily Transportation Record form.

§98.212. Sanctions.

(a) A DAHS facility may be sanctioned under §49.11(d) of this title (relating to Contracting Requirements) for failing to follow the terms of the DAHS facility contract, or failure to comply with program rules, policies, and procedures, or both. [~~A sanction may be imposed even if none of the administrative actions listed in §79.2105 of this title (relating to Grounds for Fraud Referral and Administrative Sanction) have been imposed.~~]

(b) DADS [~~The Texas Department of Human Services (DHS)~~] can deny and recoup funds from a DAHS facility for the days it exceeded its licensed capacity. The amount denied or recouped is two units of service (regardless of the number of units actually provided) for every individual (client, applicant, private pay, etc.) that exceeded the DAHS facility license capacity.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606542
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 438-3734

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PART 12. TEXAS BOARD OF OCCUPATIONAL THERAPY EXAMINERS

CHAPTER 376. REGISTRATION OF FACILITIES

40 TAC §376.1

The Texas Board of Occupational Therapy Examiners proposes an amendment to §376.1 concerning Facility Definitions. The section is proposed to add a definition for linked facilities which already appears in the rule.

John P. Maline, Executive Director of the Executive Council of Physical Therapy and Occupational Therapy Examiners, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the rule.

Mr. Maline also has determined that for each year of the first five years the rule is in effect the public benefit anticipated as a result of enforcing the rule will be clarification of facility registration. There will be no effect on small businesses nor are there anticipated economic costs to the public.

Comments on the proposed rule may be submitted to Augusta Gelfand, OT Coordinator, Texas Board of Occupational Therapy Examiners, 333 Guadalupe, Suite 2-510, Austin, Texas 78701, (512) 305-6900, or through email: augusta.gelfand@mail.capnet.state.tx.us

The amendment is proposed under the Occupational Therapy Practice Act, Title 3, Subchapter H, Chapter 456, Occupations Code, which provides the Texas Board of Occupational Therapy

Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

Title 3, Subchapter H, Chapter 454 of the Occupations Code is affected by this amended section.

§376.1. Definitions.

The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Occupational Therapy Facility--A physical site, such as a building, office, or portable facility, where the practice of occupational therapy takes place. An Occupational Therapy Facility must be under the direction of an occupational therapist, registered or licensed occupational therapist licensed by the board. The definition of Occupational Therapy Facility does not include a physical site such as a building, office, or portable facility if it meets all three conditions:

(A) it is not in the care, custody or control of the individual or company providing occupational therapy services therein; and

(B) Occupational therapy services are not provided on a predictable or regular basis at any one location; and

(C) healthcare delivery is not the primary purpose, activity, or business of the site where the services are provided.

(2) OTR or LOT in Charge--An occupational therapist, registered or licensed occupational therapist who is designated on the application for registration and who has the authority and responsibility for the facility's compliance with the Act and Rules pertaining to the practice of occupational therapy in the facility.

(3) An OT linked facility--Facility in which PT services are already registered at the same location with the same owner(s). If the PT facility registration is not current, full OT registration must be paid.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on December 8, 2006.

TRD-200606579
John Maline
Executive Director
Texas Board of Occupational Therapy Examiners
Earliest possible date of adoption: January 21, 2007
For further information, please call: (512) 305-6962

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 2. TEXAS ETHICS COMMISSION

CHAPTER 20. REPORTING POLITICAL CONTRIBUTIONS AND EXPENDITURES

SUBCHAPTER B. GENERAL REPORTING RULES

1 TAC §20.62

The Texas Ethics Commission withdraws the proposed new to §20.62 which appeared in the October 13, 2006, issue of the *Texas Register* (31 TexReg 8455).

Filed with the Office of the Secretary of State on December 5, 2006.

TRD-200606486
Natalia Luna Ashley
General Counsel
Texas Ethics Commission
Effective date: December 5, 2006
For further information, please call: (512) 463-5800

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TITLE 25. HEALTH SERVICES

PART 15. COUNCIL ON CARDIOVASCULAR DISEASE AND STROKE

CHAPTER 1051. RULES

25 TAC §1051.1

The Council on Cardiovascular Disease and Stroke withdraws the proposed amendments to §1051.1 which appeared in the June 23, 2006 issue of the *Texas Register* (31 TexReg 5040).

Filed with the Office of the Secretary of State on December 7, 2006.

TRD-200606553
Michael M. Hawkins, M.D.
Chair
Council on Cardiovascular Disease and Stroke
Effective date: December 7, 2006
For further information, please call: (512) 458-7111 x6972

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 57. FISHERIES

SUBCHAPTER A. HARMFUL OR POTENTIALLY HARMFUL EXOTIC FISH, SHELLFISH AND AQUATIC PLANTS

31 TAC §57.111, §57.113

The Texas Parks and Wildlife Department withdraws the proposed amendments to §57.111 and §57.113 which appeared in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5762).

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606547
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: December 6, 2006
For further information, please call: (512) 389-4775

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the the rule (Government Code, §2001.036). If a rule is adopted without change to the text as published in the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 4. AGRICULTURE

PART 2. TEXAS ANIMAL HEALTH COMMISSION

CHAPTER 47. APPROVED PERSONNEL

4 TAC §47.1, §47.2

The Texas Animal Health Commission (Commission) adopts amendments to Chapter 47, §47.1 and §47.2, concerning "Approved Personnel," without changes to the proposed text as published din the August 25, 2006, issue of the *Texas Register* (31 TexReg 6565) and will not be republished.

This adoption amends the definitions in §47.1 and the general requirements in §47.2. The amendments permit an approved technician, or employee of a veterinarian to collect and submit blood samples to the state/federal animal health laboratory for brucellosis testing purposes under the general supervision of the veterinarian instead of direct supervision. These amendments facilitate gathering blood samples by approved technicians or employees for situations in which cattle move directly to slaughter from locations or areas that do not have locally available veterinarians to collect the blood samples prior to shipment. Amendments to the rule would provide the ability to conduct additional serological and cultural examination of a serologically positive animal to confirm whether the animal is actually infected and determine whether or not additional testing should be required on the herd while the animal is still alive.

Pre-testing prior to shipment to slaughter allows for more efficient use of resources in that animals tested as positive would be identified and evaluated prior to slaughter, eliminating the time consuming and expensive post slaughter herd testing on animals that were serological reactors at slaughter, but were not truly infected. The Texas Board of Veterinary Medical Examiners has also proposed to modify their requirements to reflect this amendment.

No comments were received regarding adoption of the rules.

STATUTORY AUTHORITY

The amendments are adopted as follows:

The Commission is vested by statute, Texas Agriculture Code, §161.041(a), with the requirement to protect all livestock, domestic animals, and domestic fowl from disease. The Commission is authorized, by §161.041(b), to act to eradicate or control any disease or agent of transmission for any disease that affects livestock. In Chapter 163 there is §163.064, entitled "Testing and Vaccination," which provides that "(o)nly a person approved by the commission may perform testing and vaccinating for brucellosis, regardless of whether the person is a veterinarian."

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2006.

TRD-200606600
Gene Snelson
General Counsel
Texas Animal Health Commission
Effective date: December 31, 2006
Proposal publication date: August 25, 2006
For further information, please call: (512) 719-0700

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 89. ADAPTATIONS FOR SPECIAL POPULATIONS

SUBCHAPTER B. ADULT BASIC AND SECONDARY EDUCATION

19 TAC §§89.21, 89.29, 89.30, 89.32, 89.33

The State Board of Education (SBOE) adopts amendments to §§89.21, 89.29, 89.30, 89.32, and 89.33, concerning adult basic and secondary education. The amendments are adopted without changes to the proposed text as published in the October 6, 2006, issue of the *Texas Register* (31 TexReg 8325) and will not be republished.

The rules establish provisions for the adult education program delivery system. The adopted amendments provide necessary clarifications and updates to reflect existing statute and regulations and agency responsibilities identified during the recent statutorily-required review of rules in 19 TAC Chapter 89. Primarily, the adopted amendments incorporate provisions related to the adoption of the Workforce Investment Act of 1998, which updates and clarifies the use of federal funds in the provision of adult education programs.

In accordance with the Texas Education Code (TEC), §7.102(f), the SBOE approved this rule action for final adoption by a vote of more than two-thirds of its members to specify an effective date earlier than September 1, 2007, in order to implement the latest policy in a timely manner. The effective date of the adopted amendments is 20 days after filing as adopted.

In 19 TAC §89.21, Definitions, the adopted amendment eliminates wording in paragraph (6) that is in conflict with current federal statute, the Workforce Investment Act of 1998, §231(a), Grants and Contracts. Requiring eligible grant recipients to have at least one year of experience in providing adult education and literacy services is not stated in federal law and, therefore, created an additional condition for the use of federal funds and the required state match. This provision excluded potential eligible providers from applying for federal adult education funds.

In 19 TAC §89.29, Allocation of Funds, the adopted amendment eliminates subsection (b) relating to supplemental allocations which is non-essential to the granting process. The wording was redundant; it restated an allowable procedure within both state and federal budgeting operations. Furthermore, the wording implied that adult education funds could be distributed without the use of a competitive process, which is not the case. Federal enabling legislation, the Workforce Investment Act of 1998, §231(a), Grants and Contracts, stipulates that adult education funds must be awarded on a competitive basis.

In 19 TAC §89.30, Tuition and Fees, the adopted amendment eliminates subsection (c) to resolve conflicts regarding the use of program income requirements. Subsection (b) required that tuition and fees be used to support the adult education instructional program while subsection (c) permitted the expenditure of those funds for non-adult education instructional program activities. This change eliminates the conflict within the rule.

In 19 TAC §89.32, Staff Development and Special Projects, the adopted amendment updates reference to the name and appropriate section of current federal legislation, the Workforce Investment Act of 1998.

In 19 TAC §89.33, Evaluation of Programs, the adopted amendment eliminates obsolete language from the rule.

No comments were received regarding adoption of the proposed amendments.

The amendments are adopted under the TEC, §7.102(c)(16) and §29.253, which authorize the SBOE to adopt rules for adult education programs.

The amendments implement the TEC, §7.102(c)(16) and §29.253.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2006.

TRD-200606505
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: December 25, 2006
Proposal publication date: October 6, 2006
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 3. TEXAS BOARD OF CHIROPRACTIC EXAMINERS

CHAPTER 80. PROFESSIONAL CONDUCT

22 TAC §80.9

The Texas Board of Chiropractic Examiners (Board) adopts new §80.9, relating to rules to prevent fraud, as required by the Board's Sunset legislation. The new rule is adopted without changes to the proposed text as published in the September 22, 2006, issue of the *Texas Register* (31 TexReg 8058).

The Board's recent Sunset Act, House Bill 972, 79th Legislature, Regular Session, amended the Chiropractic Act, Texas Occupations Code Chapter 201, by adding new §201.1555, relating to fraud, that mandates that the Board adopt rules to prevent fraud. Section 201.1555 requires that the rules include provisions relating to the filing of workers' compensation and insurance claims and records required to be maintained in connection with the practice of chiropractic.

This new rule builds upon the Board's existing authority relating to fraud: §201.155, relating to authority to adopt rules to prohibit false, misleading, or deceptive practices, particularly advertising; §201.502, relating to deception or fraud; presentation of an illegal or fraudulent license, certificate, or diploma; presentation of untrue testimony or document or testimony illegally used to pass the examination; altering with fraudulent intent a license, certification, or diploma; impersonating for an examination; and impersonating a licensed chiropractor as grounds for refusal, revocation, or suspension of a license; §201.5025, relating to prohibiting the submission of a false or misleading statement, document, or certificate in an application for a license and prohibiting fraud or deception in the taking or passing an examination and prohibiting unprofessional or dishonorable conduct that is likely to deceive or defraud the public or injure the public; and §201.5026, relating to unprofessional or dishonorable conduct that is likely to deceive or defraud the public.

The Board currently has the following existing rules in this title regarding fraud in the practice of chiropractic: §71.2(f), relating to the submission of false information as grounds for denying right to take examination; §73.3(c), relating to verification of continuing education; §75.1(a), relating to grossly unprofessional conduct defined as including exploiting patients through the fraudulent use of chiropractic services which result in financial gain for a licensee or a third party and submitting a claim for chiropractic services, good, or appliances which contains charges for services not actually rendered or goods or appliances not actually sold; and §77.2, relating to prohibition on the use of any form of public communication which contains a false, fraudulent, misleading, deceptive, or unfair statement of claim, or which has the tendency or capacity to mislead or deceive the general public. A violation of the Board's standards for grossly unprofessional conduct, §75.1(a), is a Category I Offense subject to a fine of up to $1000 for a first offense. The Board has also established standards for the maintenance of chiropractic records under §80.5. This new rule is intended to supplement and work in concert with the Board's existing rules.

Subsection (a) sets out a policy against health care fraud. Subsection (b) defines fraud as an intentional misrepresentation when there is (1) a cause of deception; (2) an act or acts showing an intentional misrepresentation of fact; and (3) the health care provider stands to gain financially from the deception and misrepresentation. Subsection (c) incorporates by reference into this proposed rule the Board's existing rules regarding fraud in the practice of chiropractic.

No comments were received regarding the proposed rule.

The new rule is adopted under the Texas Occupations Code, §201.152, relating to rules, and §201.1555, relating to fraud. Section 201.152 authorizes the Board to adopt rules necessary to regulate the practice of chiropractic. Section 201.1555 authorizes the Board to adopt rules to prevent fraud in the practice of chiropractic.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2006.

TRD-200606504
Glenn Parker
Executive Director
Texas Board of Chiropractic Examiners
Effective date: December 25, 2006
Proposal publication date: September 22, 2006
For further information, please call: (512) 305-6901

PART 23. TEXAS REAL ESTATE COMMISSION

CHAPTER 537. PROFESSIONAL AGREEMENTS AND STANDARD CONTRACTS

22 TAC §§537.11, 537.20 - 537.23, 537.26 - 537.28, 537.30 - 537.33, 537.35, 537.37, 537.39 - 537.41, 537.43 - 537.49

The Texas Real Estate Commission (TREC) adopts amendments to §§537.11, 537.20 - 537.23, 537.26 - 537.28, 537.30 - 537.33, 537.35, 537.37, 537.39 - 537.41, and 537.43 - 537.49, concerning Professional Agreements and Standard Contract Forms. Sections 537.11, 537.20 - 537.23, 537.28, 537.30 - 537.32, 537.35, 537.39 - 537.41, and 537.43 - 537.49 are adopted without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8613). Sections 537.26, 537.27, 537.33 and 537.37 are adopted with changes to the forms adopted by reference, therefore the text of these rules will be republished.

The revised forms may be used on a voluntary basis upon adoption; licensees will be required to use the forms on a mandatory basis as of March 1, 2007. Texas real estate licensees are generally required to use forms promulgated by TREC when negotiating contacts for the sale of real property. These forms are drafted by the Texas Real Estate Broker-Lawyer Committee, an advisory body consisting of six attorneys appointed by the President of the State Bar of Texas, six brokers appointed by TREC, and a public member appointed by the governor.

The amendment to §537.11 deletes the text in subsection (a). The amendments to §§537.20 - 537.23, 537.26 - 537.28, 537.30 - 537.33, 537.35, 537.37, 537.39 - 537.41, and 537.43 - 537.49 add the text deleted from §537.11(a) as appropriate for each section and form so that the description of each form is included in the section that adopts the form by reference. In addition, the amendments to each section include a reference to the commission's website as another means by which a person may obtain the form. Generally speaking the revisions to each of the forms are primarily non-substantive in nature and update them for consistency with existing contract forms that have been revised in the recent past. Minor non-substantive typographical errors were corrected on the proposed forms.

The revisions to the forms as adopted do not change the nature or scope so much that they could be deemed different forms. The forms as adopted do not affect individuals other than those contemplated by the forms as proposed. The forms as adopted do not impose more onerous requirements that the proposed versions and do not materially alter the issues raised in the proposed forms. Changes in the forms adopted by reference reflect non-substantive variations from the proposed rules and forms to clarify their intent and improve style and readability.

The reasoned justification for the revisions to the rules and forms adopted by references is to clarify existing rules, remove redundant provisions, and to make the forms more consistent with other promulgated forms.

No comments were received during the notice and comment period.

The amendment to §537.26 adopts by reference Standard Contract Form TREC No. 15-4, Seller's Temporary Lease. Paragraph 12 is revised to require the tenant to provide the landlord with door keys and access codes to allow access to the property during the term of the lease. Paragraph 24 is revised to include a blank for e-mail addresses. The blank line for the execution date is removed as the execution date is provided for in the contract to which the lease is attached.

The amendment to §537.27 adopts by reference Standard Contract Form TREC No. 16-4, Buyer's Temporary Lease. Paragraph 12 is revised to require the tenant to provide the landlord with door keys and access codes to allow access to the property during the term of the lease. Paragraph 14 is revised to add equipment and appliances to the list of specific expenses of repairing, replacing and maintaining the property that the buyer/tenant will bear. Paragraph 24 is revised to include a blank for e-mail addresses. The blank line for the execution date is removed as the execution date is provided for in the contract to which the lease is attached.

The amendment to §537.33 adopts by reference Standard Contract Form TREC No. 26-5, Seller Financing Condition Addendum. Regarding proposed revisions to paragraph C, a blank line for the interest rate of the note is added; a provision addressing the interest rate of matured unpaid amount is added; subparagraphs (2) and (3) provide for a choice of monthly installments rather than an option to fill in the blanks on the type of installment; a note is added to subparagraph D(1) which states that the buyer's liability to pay the note will continue unless the buyer obtains a release of liability from the Seller; subparagraph D(2)(a) is revised by adding "ad valorem" before "taxes".

The amendment to §537.37 adopts by reference Standard Contract Form TREC No. 30-6, Residential Condominium Contract (Resale). The change to the form fixes a typographical error in paragraph 7.F.

The amendments and forms are adopted under Texas Occupations Code, §1101.151, which authorizes the Texas Real Estate Commission to adopt and enforce rules necessary to administer Chapters 1101 and 1102; and to establish standards of conduct and ethics for its licensees to fulfill the purposes of chapters 1101 and 1102 and ensure compliance with Chapters 1101 and 1102.

The statute affected by this adoption is Texas Occupations Code, Chapter 1101. No other statute, code or article is affected by the adopted amendments.

§537.26. Standard Contract Form TREC No. 15-4.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 15-4 approved by the Texas Real Estate Commission in 2006 for use as a residential lease when a seller temporarily occupies property after closing. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711, www.state.tx.us.

§537.27. Standard Contract Form TREC No. 16-4.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 16-4 approved by the Texas Real Estate Commission in 2006 for use as a residential lease when a buyer temporarily occupies property prior to closing. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711, www.state.tx.us.

§537.33. Standard Contract Form TREC No. 26-5.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 26-5 approved by the Texas Real Estate Commission in 2006 for use as an addendum concerning seller financing. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

§537.37. Standard Contract Form TREC No. 30-6.

The Texas Real Estate Commission adopts by reference standard contract form TREC No. 30-6 approved by the Texas Real Estate Commission in 2006 for use in the resale of a residential condominium unit. This document is published by and available from the Texas Real Estate Commission, P.O. Box 12188, Austin, Texas 78711-2188, www.state.tx.us.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2006.

TRD-200606551
Loretta R. DeHay
General Counsel
Texas Real Estate Commission
Effective date: December 27, 2006
Proposal publication date: October 20, 2006
For further information, please call: (512) 465-3900

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 157. EMERGENCY MEDICAL CARE

SUBCHAPTER G. EMERGENCY MEDICAL SERVICES TRAUMA SYSTEMS

The Executive Commissioner of the Health and Human Services Commission (commission), on behalf of the Department of State Health Services (department), adopts the repeal of §157.125 and new §157.125 concerning requirements for trauma facility designation; and an amendment to §157.128 concerning denial, suspension, and revocation of trauma facility designation. New §157.125 is adopted with changes to the proposed text as published in the June 9, 2006, issue of the *Texas Register* (31 TexReg 4690). The repeal of §157.125 and amendment to §157.128 are adopted without changes and, therefore, the sections will not be republished.

BACKGROUND AND PURPOSE

The repeal, new section, and amendment are necessary to update, remove obsolete language, reorganize, and clarify the requirements for meeting trauma designation standards. The rules were endorsed by the stakeholder group, the Governor's Emergency Medical Services and Trauma Advisory Council's (GETAC) Trauma Systems Committee, and department staff after over two years of discussion and stakeholder input. Changes to the rules are expected to positively impact the care provided to patients in designated trauma centers throughout the state. The department also anticipates a positive impact on hospitals and the organizations that represent them. The rules are expected to have a positive impact on the department when the department designates trauma facilities, reviews survey reports, and enforces trauma facility designation rules.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Sections 157.125 and 157.128 have been reviewed and the department has determined that reasons for adopting the sections continue to exist because rules on this subject are needed.

SECTION-BY-SECTION SUMMARY

The repeal of existing §157.125 and new §157.125 provide clarity due to the number of changes. The new rule better defines the various levels of trauma designation to include the process for review and designation of healthcare facilities based on the level of designation deemed appropriate by the department; the definition of a healthcare facility as it relates to trauma designation; the three phases of the trauma designation process; and a timely and sufficient application.

The new rule outlines the process for requesting exceptions to criteria and for reporting deficiencies. It adds language to address air medical provider access to designated landing sites at the healthcare facility and the process used to implement any changes to designated landing sites.

The new rule also updates the composition of the trauma designation site survey team, as well as designation requirements, to include such things as pediatric-specific education and the use of the American College of Surgeons (ACS) or a comparable organization to conduct the trauma designation survey.

The new rule aligns existing rule language with national standards of care for trauma facilities set forth by ACS and applies state standards consistently across all levels of trauma designation by requiring hospitals that have achieved higher levels of trauma designation to also meet all required standards for hospitals with lower designation levels, which includes such things as nursing education requirements that are not addressed by ACS.

The new rule establishes consistent performance standards for all hospitals seeking Level III trauma facility designation, to include a requirement for orthopedic surgeons, full-time trauma

program managers/trauma nurse coordinators, and outreach programs.

The amendment to §157.128 provides clarification to the rule, updates reference to a statute and the name of the department's program to the "Office of EMS/Trauma Systems Coordination" which provides rule oversight.

COMMENTS

The department, on behalf of the commission, has reviewed and prepared responses to the comments received regarding the proposed rules during the comment period, which the commission has reviewed and accepts. Comments were received from individuals, associations, and/or groups, including the Texas Hospital Association (THA) and the Texas Organization of Rural and Community Hospitals (TORCH). Comments received were not against the rules in their entirety; those providing comments did, however, suggest recommendations for changes as discussed in the summary of comments below.

The department received public comments from 10 organizations and individuals during the comment period.

Comment: Concerning the fiscal note in the proposed preamble, the Texas Hospital Association states that the following statement is misleading: "a local government operates a healthcare facility and voluntarily chooses to seek trauma designation." THA believes this statement may be misleading: a local government operating a healthcare facility must seek trauma designation to qualify for receipt of disproportionate share hospital (DSH) funds.

Response: The commission disagrees with the comment. Trauma facility designation is not required for hospital licensure either in statute or by departmental rules. Hospitals may choose to go through the trauma facility designation process. Even if successful, however, trauma designation alone does not ensure that a hospital will receive Medicaid disproportionate share hospital (DSH) funding. Trauma designation is only one of several required conditions of participation for hospitals that choose to apply for DSH funding. No change was made as a result of this comment.

Comment: Concerning the fiscal note in the proposed preamble, the Texas Hospital Association states that the following statement in the proposed rule is misleading: "local governments that currently operate or seek Level III trauma designation may incur costs to maintain 24/7 orthopedic coverage. In addition, many rural Level III trauma facilities will lack the necessary resources to fund the relocation and on-call contracts of orthopedic surgeons."

Response: The commission disagrees with the comment. There may not always be costs solely associated orthopedic coverage in every Level III facility. The cost of orthopedic coverage will be dependant upon such things as regional healthcare market forces and/or local option agreements between orthopedic surgeons and hospitals in a given community. Additionally, the department reserves the right to grant an exception to this subsection if it finds that compliance with this subsection would not be in the best interests of the persons served in an affected local trauma system. No change was made as a result of this comment.

Comment: Concerning §157.125(d)(4), one individual provided a comment objecting to the requirement that a facility's trauma designation application be submitted one year in advance of its trauma designation expiration date.

Response: The commission disagrees with the comment. The consensus reached by stakeholders at the Governor's EMS and Trauma Advisory meetings was that this standard should be implemented for all applicant trauma facilities in Texas. The timeframe in the rule language is necessary to ensure that the department has ample time to review a hospital's capabilities reported in its application and determine if the facility applied for the appropriate level of trauma designation. In addition, the rule language does not forbid a facility from submitting its application less than one year from its designation expiration date. If the application is not received within one year or greater of their expiration, a facility trauma designation status may expire if the entire designation process is not completed before its trauma designation expires. Hospitals who fail to maintain trauma designation are not eligible for funding opportunities offered by the department that can offset uncompensated trauma care provided by the facility. In some cases, the loss of funding can substantially impact a hospital's operations. No change was made as a result of this comment.

Comment: Concerning §157.125(j)(2) - (3), one individual provided a comment asking for clarification why Level III trauma facilities were required to use the ACS verification process and why Level IV trauma facilities were exempted from that requirement.

Response: The commission would like to clarify that at this time the ACS has not implemented a process to verify level IV trauma facilities and, therefore, the use of department-credentialed surveyors will continue for Level IV trauma facilities. The commission would like also like to clarify that use of the ACS to conduct Level III trauma designation site surveys is consistent with national standards and is one of the two survey process options provided in the rule. The rule language also allows Level III trauma facilities to use a comparable organization approved by the department for a trauma designation site survey. Both of these options are consistent with incremental and steadily progressive advances toward a mature, sustainable state trauma designation program. No change was made as a result of this comment.

Comment: Concerning §157.125(k)(1), one individual provided a comment requesting that the emergency physician and trauma nurse not be required as part of the survey team for Level I and II trauma verification site surveys.

Response: The commission disagrees with the comment. The emergency physician and trauma nurse are integral to the Level I and Level II trauma designation site survey processes. The emergency department's care of trauma patients is a critical component of a facility's trauma program and needs to be evaluated by an emergency physician. Additionally, there are trauma nursing care requirements outlined in the department trauma designation rules for Level I and II trauma facilities that necessitate the presence of an experienced trauma nurse to evaluate during the site survey process. No change was made as a result of this comment.

Comment: Concerning §157.125(s)(3)(B), one individual provided a comment stating there is inconsistency in the rule as it relates to the data entry requirements for the trauma registry.

Response: The commission would like to clarify that the rule language is consistent and requires data to be extracted from trauma patient charts and entered into the facility's trauma registry no later than 45 days after the patient is discharged. The rule language has an entirely separate requirement that states

the data must be uploaded from the facility's trauma registry to the state trauma registry on at least a quarterly basis. No change was made as a result of this comment.

Comment: Concerning §157.125(s)(4)(D), the Texas Hospital Association, Texas Organization of Rural and Community Hospitals and one individual provided comments requesting language be added to the proposed rule language that states decisions emanating from a regional advisory council's (RACs) alternative dispute resolution process be non-binding.

Response: The commission agrees with the comment. The word "nonbinding" has been added to clarify the department's intent.

Comment: Concerning the criteria in (A.3.c.) in Figure §157.125(x), the Texas Organization of Rural and Community Hospitals and one individual provided comments objecting to the proposed rule criteria that requires the trauma nurse coordinator position be a 0.8 full time equivalent (FTE) for Level III trauma facilities.

Response: The commission disagrees with the suggested changes to the proposed rule criteria. The rule criteria requires a full-time trauma nurse coordinator with at least a 0.8 FTE dedicated to the trauma program. The consensus reached by stakeholders at the Governor's EMS and Trauma Advisory Council (GETAC) meetings was that this standard shall be implemented for all Level III trauma facilities in Texas. There was much discussion among stakeholders during the rule review process and the consensus was that the 0.8 FTE dedicated to a facility's trauma program reflects the commitment of a tertiary care hospital with advanced surgical capabilities to provide trauma care. The trauma nurse coordinator is an integral member of a facility's trauma program. To ensure continuous compliance with the Level III trauma designation standards, the department agrees with the stakeholders' consensus that at minimum a 0.8 FTE dedicated to the trauma program is necessary. The department reserves the right to grant an exception to this subsection if it finds that compliance with this subsection would not be in the best interests of the persons served in an affected local trauma system. No changes were made as a result of these comments.

Comment: Concerning the criteria in (A.4.) in Figure §157.125(x), one individual provided a comment objecting to the proposed rule criteria requiring a separate full time trauma registrar for facilities with over 500 registry cases for a Level III trauma facility.

Response: The commission disagrees and would like to clarify that the proposed rule language does not require Level IIIs to have a full-time trauma registrar. There was much discussion among stakeholders during the rule review process and the consensus was that the proposed rule criteria requires a Level III to identify a trauma registrar who is separate but supervised by the trauma nurse coordinator. The proposed rule criteria states that typically, one full-time trauma registrar shall be required to process approximately 500 patients annually. No change was made as a result of this comment.

Comment: Concerning the criteria (B.1.b.) in Figure §157.125(x), the Texas Hospital Association, provided comments requesting that the orthopedic surgery requirement for Advanced (Level III) trauma facilities remain as an essential requirement for "lead" Level III facilities and a desirable requirement for other Level III facilities.

Response: The commission disagrees with the suggested amendment to the language. There was much discussion among stakeholders during the rule review process. The consensus reached by stakeholders was that this criterion should be implemented for all Level III trauma facilities in Texas. This requirement is consistent with national standards set forth by the ACS for Level III trauma facilities. The department reserves the right to grant an exception to this subsection if it finds that compliance with this subsection would not be in the best interests of the persons served in an affected local trauma system. No changes were made as a result of these comments.

Comment: Concerning the criteria in (B.1.b.) in Figure §157.125(x), the Texas Organization of Rural and Community Hospitals and four individuals provided comments recommending that the proposed rule criteria requiring orthopedic surgery coverage be a desired criteria for Level III trauma facilities.

Response: The commission disagrees with the suggested amendment to the language. There was much discussion among stakeholders during the rule review process. The consensus reached by stakeholders was that this criteria should be implemented for all Level III trauma facilities in Texas. This requirement is consistent with national standards set forth by the ACS for Level III trauma facilities. The department reserves the right to grant an exception to this subsection if it finds that compliance with this subsection would not be in the best interests of the persons served in an affected local trauma system. No changes were made as a result of these comments.

Comment: Concerning the criteria in (B.1.c.) in Figure §157.125(x), the Texas Hospital Association provided comments recommending that the proposed rule criteria be revised to read as follows: "Neurosurgery coverage is a desired criteria in a Level III trauma facility, but are 'essential' when a Level III has full-time neurosurgical coverage." Additionally, Texas Organization of Rural and Community Hospitals and one individual provided a comment requesting that Neurosurgery coverage remain a desired criterion in a Level III trauma facility.

Response: The commission disagrees and would like to clarify that the proposed rule criteria does not require Level IIIs trauma facilities to have any neurosurgical coverage. No changes were made as a result of these comments.

Comment: Concerning the criteria (A.2.c.) in Figure §157.125(y), the Texas Hospital Association, Texas Organization of Rural and Community Hospitals and three individuals provided comments objecting to the proposed rule criteria that requires the trauma nurse coordinator position be a 0.8 FTE for Level IV trauma facilities.

Response: The commission disagrees and would like to clarify that the proposed rule criteria does not require Level IVs to have a 0.8 FTE trauma nurse coordinator. The rule criteria requires a trauma facility to identify a trauma nurse coordinator. The rule criteria states that the trauma nurse coordinator position should be a 0.8 full time equivalent. No changes were made as a result of these comments.

Comment: Concerning the criteria (C.) in Figure §157.125(y), one individual provided a comment with concerns that the proposed rule criteria requires Advance Trauma Life Support (ATLS) for nurses who care for trauma patients.

Response: The commission disagrees and would like to clarify that the proposed rule criteria does not require ATLS for nurses

who care for trauma patients. No change was made as a result of this comment.

The department staff, on behalf of the commission, provided comments and the commission has reviewed and agrees to the following changes.

Change: Concerning §157.125(s)(5)(A) - (C), minor revisions were made for sentence structure and clarification.

Change: Concerning the criteria (B.1.c.) in Figure §157.125(x), the wording was changed from "these criteria" to "the performance standards below" for clarification purposes. The word "the" was added to the fourth paragraph for sentence structure.

Change: Concerning the criteria (F.3.b) in Figure §157.125(x) and the criteria (16.) in Figure §157.125(x)(1), minor wording was added for sentence structure.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Cathy Campbell, certifies that the rules, as adopted, have been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

25 TAC §157.125

STATUTORY AUTHORITY

The repeal is adopted under the Health and Safety Code, Chapter 773, Emergency Medical Services, which provides the department with the authority to adopt rules to implement the Emergency Medical Services Act; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation, provision, and administration of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606528
Cathy Campbell
General Counsel
Department of State Health Services
Effective date: December 26, 2006
Proposal publication date: June 9, 2006
For further information, please call: (512) 458-7111 x6972

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25 TAC §157.125, §157.128

STATUTORY AUTHORITY

The new rule and amendment are adopted under the Health and Safety Code, Chapter 773, Emergency Medical Services, which provides the department with the authority to adopt rules to implement the Emergency Medical Services Act; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation, provision, and administration of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001.

§157.125. Requirements for Trauma Facility Designation.

(a) The Office of Emergency Medical Services (EMS)/Trauma Systems Coordination (office) shall recommend to the Commissioner of the Department of State Health Services (commissioner) the designation of an applicant/healthcare facility (facility) as a trauma facility at the level(s) for each location of a facility the office deems appropriate.

(1) Comprehensive (Level I) trauma facility designation--The facility, including a free-standing children's facility, meets the current American College of Surgeons (ACS) essential criteria for a verified Level I trauma center; meets the "Advanced Trauma Facility Criteria" in subsection (x) of this section; actively participates on the appropriate Regional Advisory Council (RAC); has appropriate services for dealing with stressful events available to emergency/trauma care providers; and submits data to the Texas EMS/Trauma Registry.

(2) Major (Level II) trauma facility designation--The facility, including a free-standing children's facility, meets the current ACS essential criteria for a verified Level II trauma center; meets the "Advanced Trauma Facility Criteria" in subsection (x) of this section; actively participates on the appropriate RAC; has appropriate services for dealing with stressful events available to emergency/trauma care providers; and submits data to the Texas EMS/Trauma Registry.

(3) Advanced (Level III) trauma facility designation--The facility meets the "Advanced Trauma Facility Criteria" in subsection (x) of this section; actively participates on the appropriate RAC; has appropriate services for dealing with stressful events available to emergency/trauma care providers; and submits data to the Texas EMS/Trauma Registry. A free-standing children's facility, in addition to meeting the requirements listed in this section, must meet the current ACS essential criteria for a verified Level III trauma center.

(4) Basic (Level IV) trauma facility designation--The facility meets the "Basic Trauma Facility Criteria" in subsection (y) of this section; actively participates on the appropriate RAC; has appropriate services for dealing with stressful events available to emergency/trauma care providers; and submits data to the Texas EMS/Trauma Registry.

(b) A healthcare facility is defined under these rules as a single location where inpatients receive hospital services or each location if there are multiple buildings where inpatients receive hospital services and are covered under a single hospital license.

(1) Each location shall be considered separately for designation and the Department of State Health Services (department) will determine the designation level for that location, based on, but not limited to, the location's own resources and levels of care capabilities; Trauma Service Area (TSA) capabilities; and the essential criteria and requirements outlined in subsection (a)(1) - (4) of this section. The final determination of the level(s) of designation may not be the level(s) requested by the facility.

(2) A facility with multiple locations that is applying for designation at one location shall be required to apply for designation at each of its other locations where there are buildings where inpatients receive hospital services and such buildings are collectively covered under a single hospital's license.

(c) The designation process shall consist of three phases.

(1) First phase--The application phase begins with submitting to the office a timely and sufficient application for designation as

a trauma facility and ends when the survey report is received by the office.

(2) Second phase--The review phase begins with the office's review of the survey report and ends with its recommendation to the commissioner whether or not to designate the facility and at what level(s). This phase also includes an appeal procedure governed by the department's rules for a contested case hearing and by Government Code, Chapter 2001.

(3) Third phase--The final phase begins with the commissioner reviewing the recommendation and ends with his/her final decision.

(d) For a facility seeking initial designation, a timely and sufficient application shall include:

(1) the department's current "Complete Application" form for the appropriate level, with all fields correctly and legibly filled-in and all requested documents attached, hand-delivered or sent by postal services to the office;

(2) full payment of the designation fee enclosed with the submitted "Complete Application" form;

(3) any subsequent documents submitted by the date requested by the office;

(4) a trauma designation survey completed within one year of the date of the receipt of the application by the office; and

(5) a complete survey report, including patient care reviews, that is within 180 days of the date of the survey and is hand-delivered or sent by postal services to the office.

(e) If a hospital seeking initial designation fails to meet the requirements in subsection (d)(1) - (5) of this section, the application shall be denied.

(f) For a facility seeking re-designation, a timely and sufficient application shall include:

(1) the department's current "Complete Application" form for the appropriate level, with all fields correctly and legibly filled-in and all requested documents attached, hand-delivered or sent by postal services to the office one year or greater from the designation expiration date;

(2) full payment of the designation fee enclosed with the submitted "Complete Application" form;

(3) any subsequent documents submitted by the date requested by the office; and

(4) a complete survey report, including patient care reviews, that is within 180 days of the date of the survey and is hand-delivered or sent by postal services to the office no less than 60 days prior to the designation expiration date.

(g) If a healthcare facility seeking re-designation fails to meet the requirements outlined in subsection (f)(1) - (4) of this section, the original designation will expire on its expiration date.

(h) The office's analysis of the submitted "Complete Application" form may result in recommendations for corrective action when deficiencies are noted and shall also include a review of:

(1) the evidence of current participation in RAC/regional system planning; and

(2) the completeness and appropriateness of the application materials submitted, including the submission of a non-refundable application fee as follows:

(A) for Level I and Level II trauma facility applicants, the fee will be no more than $10 per licensed bed with an upper limit of $5,000 and a lower limit of $4,000;

(B) for Level III trauma facility applicants, the fee will be no more than $10 per licensed bed with an upper limit of $2,500 and a lower limit of $1,500; and

(C) for Level IV trauma facility applicants, the fee will be no more than $10 per licensed bed with an upper limit of $1000 and a lower limit of $500.

(i) When a "Complete Application" form for initial designation or re-designation from a facility is received, the office will determine the level it deems appropriate for pursuit of designation or re-designation for each of the facility's locations based on, but not limited to: the facility's resources and levels of care capabilities at each location, TSA resources, and the essential criteria for Levels I, II, III, and IV trauma facilities. In general, physician services capabilities described in the application must be in place 24 hours a day/7 days a week. In determining whether a physician services capability is present, the department may use the concept of substantial compliance that is defined as having said physician services capability at least 90% of the time.

(1) If a facility disagrees with the level(s) determined by the office to be appropriate for pursuit of designation or re-designation, it may make an appeal in writing within 60 days to the director of the office. The written appeal must include a signed letter from the facility's governing board with an explanation as to why designation at the level determined by the office would not be in the best interest of the citizens of the affected TSA or the citizens of the State of Texas.

(2) The written appeal may include a signed letter (s) from the executive board of its RAC or individual healthcare facilities and/or EMS providers within the affected TSA with an explanation as to why designation at the level determined by the office would not be in the best interest of the citizens of the affected TSA or the citizens of the State of Texas.

(3) If the office upholds its original determination, the director of the office will give written notice of such to the facility within 30 days of its receipt of the applicant's complete written appeal.

(4) The facility may, within 30 days of the office's sending written notification of its denial, submit a written request for further review. Such written appeal shall then go to the Assistant Commissioner, Division for Regulatory Services (assistant commissioner).

(j) When the analysis of the "Complete Application" form results in acknowledgement by the office that the facility is seeking an appropriate level of designation or re-designation, the facility may then contract for the survey, as follows.

(1) Level I and II facilities and all free-standing children's facilities shall request a survey through the ACS trauma verification program.

(2) Level III facilities shall request a survey through the ACS trauma verification program or through a comparable organization approved by the department.

(3) Level IV facilities shall request a survey through the ACS trauma verification program, through a comparable organization approved by the department, or by a department-credentialed surveyor(s) active in the management of trauma patients.

(4) The facility shall notify the office of the date of the planned survey and the composition of the survey team.

(5) The facility shall be responsible for any expenses associated with the survey.

(6) The office, at its discretion, may appoint an observer to accompany the survey team. In this event, the cost for the observer shall be borne by the office.

(k) The survey team composition shall be as follows.

(1) Level I or Level II facilities shall be surveyed by a team that is multi-disciplinary and includes at a minimum: 2 general surgeons, an emergency physician, and a trauma nurse all active in the management of trauma patients.

(2) Free-standing children's facilities of all levels shall be surveyed by a team consistent with current ACS policy and includes at a minimum: a pediatric surgeon; a general surgeon; a pediatric emergency physician; and a pediatric trauma nurse coordinator or a trauma nurse coordinator with pediatric experience.

(3) Level III facilities shall be surveyed by a team that is multi-disciplinary and includes at a minimum: a trauma surgeon and a trauma nurse (ACS or department-credentialed), both active in the management of trauma patients.

(4) Level IV facilities shall be surveyed by a department-credentialed representative, registered nurse or licensed physician. A second surveyor may be requested by the facility or by the department.

(5) Department-credentialed surveyors must meet the following criteria:

(A) have at least 3 years experience in the care of trauma patients;

(B) be currently employed in the coordination of care for trauma patients;

(C) have direct experience in the preparation for and successful completion of trauma facility verification/designation;

(D) have successfully completed a department-approved trauma facility site surveyor course and be successfully re-credentialed every 4 years; and

(E) have current credentials as follows:

(i) for nurses: Trauma Nurses Core Course (TNCC) or Advanced Trauma Course for Nurses (ATCN); and Pediatric Advanced Life Support (PALS) or Emergency Nurses Pediatric Course (ENPC);

(ii) for physicians: Advanced Trauma Life Support (ATLS); and

(iii) have successfully completed a site survey internship.

(6) All members of the survey team, except department staff, shall come from a TSA outside the facility's location and at least 100 miles from the facility. There shall be no business or patient care relationship or any potential conflict of interest between the surveyor or the surveyor's place of employment and the facility being surveyed.

(l) The survey team shall evaluate the facility's compliance with the designation criteria, by:

(1) reviewing medical records; staff rosters and schedules; process improvement committee meeting minutes; and other documents relevant to trauma care;

(2) reviewing equipment and the physical plant;

(3) conducting interviews with facility personnel;

(4) evaluating compliance with participation in the Texas EMS/Trauma Registry; and

(5) evaluating appropriate use of telemedicine capabilities where applicable.

(m) The site survey report in its entirety shall be part of a facility's performance improvement program and subject to confidentiality as articulated in the Health and Safety Code, §773.095.

(n) The surveyor(s) shall provide the facility with a written, signed survey report regarding their evaluation of the facility's compliance with trauma facility criteria. This survey report shall be forwarded to the facility within 30 calendar days of the completion date of the survey. The facility is responsible for forwarding a copy of this report to the office if it intends to continue the designation process.

(o) The office shall review the findings of the survey report for compliance with trauma facility criteria.

(1) A recommendation for designation shall be made to the commissioner based on compliance with the criteria.

(2) If a facility does not meet the criteria for the level of designation deemed appropriate by the office, the office shall notify the facility of the requirements it must meet to achieve the appropriate level of designation.

(3) If a facility does not comply with criteria, the office shall notify the facility of deficiencies and recommend corrective action.

(A) The facility shall submit to the office a report that outlines the corrective action(s) taken. The office may require a second survey to ensure compliance with the criteria. If the office substantiates action that brings the facility into compliance with the criteria, the Office shall recommend designation to the commissioner.

(B) If a facility disagrees with the office's decision regarding its designation application or status, it may request a secondary review by a designation review committee. Membership on a designation review committee will:

(i) be voluntary;

(ii) be appointed by the office director;

(iii) be representative of trauma care providers and appropriate levels of designated trauma facilities; and

(iv) include representation from the department and the Trauma Systems Committee of the Governor's EMS and Trauma Advisory Council (GETAC).

(C) If a designation review committee disagrees with the office's recommendation for corrective action, the records shall be referred to the assistant commissioner for recommendation to the commissioner.

(D) If a facility disagrees with the office's recommendation at the end of the secondary review, the facility has a right to a hearing, in accordance with the department's rules for contested cases, and Government Code, Chapter 2001.

(p) The facility shall have the right to withdraw its application at any time prior to being recommended for trauma facility designation by the office.

(q) If the commissioner concurs with the recommendation to designate, the facility shall receive a letter and a certificate of designation valid for 3 years. Additional actions, such as a site review or submission of information/reports to maintain designation, may be required by the department.

(r) It shall be necessary to repeat the designation process as described in this section prior to expiration of a facility's designation or the designation expires.

(s) A designated trauma facility shall:

(1) comply with the provisions within these sections; all current state and system standards as described in this chapter; and all policies, protocols, and procedures as set forth in the system plan;

(2) continue its commitment to provide the resources, personnel, equipment, and response as required by its designation level;

(3) participate in the Texas EMS/Trauma Registry. Data submission requirements for designation purposes are as follows.

(A) Initial designation--Six months of data prior to the initial designation survey must be uploaded. Subsequent to initial designation, data should be uploaded to the Texas EMS/Trauma Registry on at least a quarterly basis (with monthly submissions recommended) as indicated in §103.19 of this title (relating to Electronic Reporting).

(B) Re-designation--The facility's trauma registry should be current with at least quarterly uploads of data to the Texas EMS/Trauma Registry (monthly submissions recommended) as indicated in §103.19 of this title;

(4) notify the office, its RAC plus other affected RACs of all changes that affect air medical access to designated landing sites.

(A) Non-emergent changes shall be implemented no earlier than 120 days after a written notification process.

(B) Emergency changes related to safety may be implemented immediately along with immediate notification to department, the RAC, and appropriate Air Medical Providers.

(C) Conflicts relating to helipad air medical access changes shall be negotiated between the facility and the EMS provider.

(D) Any unresolved issues shall be handled utilizing the nonbinding alternative dispute resolution (ADR) process of the RAC in which the helipad is located;

(5) within 5 days, notify the office; its RAC plus other affected RACs; and the healthcare facilities to which it customarily transfers-out trauma patients or from which it customarily receives trauma transfers-in if temporarily unable to comply with a designation criterion. If the healthcare facility intends to comply with the criterion and maintain current designation status, it must also submit to the office a plan for corrective action and a request for a temporary exception to criteria within 5 days.

(A) If the requested essential criterion exception is not critical to the operations of the healthcare facility's trauma program and the office determines that the facility has intent to comply, a 30-day to 90-day exception period from the onset date of the deficiency may be granted for the facility to achieve compliancy.

(B) If the requested essential criterion exception is critical to the operations of the healthcare facility's trauma program and the office determines that the facility has intent to comply, no greater than a 30-day exception period from the onset date of the deficiency may be granted for the facility to achieve compliancy. Essential criteria that are critical include such things as:

(i) neurological surgery capabilities (Level I, II);

(ii) orthopedic surgery capabilities (Level I, II, III);

(iii) general/trauma surgery capabilities (Level I, II, III);

(iv) anesthesiology (Levels I, II, III);

(v) emergency physicians (all levels);

(vi) trauma medical director (all levels);

(vii) trauma nurse coordinator/program manager (all levels); and

(viii) trauma registry (all levels).

(C) If the healthcare facility has not come into compliance at the end of the exception period, the office may at its discretion elect one of the following:

(i) allow the facility to request designation at the level appropriate to its revised capabilities;

(ii) propose to re-designate the facility at the level appropriate to its revised capabilities;

(iii) propose to suspend the facility's designation status. If the facility is amenable to this action, the office will develop a plan for corrective action for the facility and a specific timeline for compliance by the facility; or

(iv) propose to extend the facility's temporary exception to criteria for an additional period not to exceed 90 days. The department will develop a plan for corrective action for the facility and a specific timeline for compliance by the facility.

(I) Suspensions of a facility's designation status and exceptions to criteria for facilities will be documented on the office website.

(II) If the facility disagrees with a proposal by the office, or is unable or unwilling to meet the office-imposed timelines for completion of specific actions plans, it may request a secondary review by a designation review committee as defined in subsection (o)(3)(B) of this section.

(III) The office may at its discretion choose to activate a designation review committee at any time to solicit technical advice regarding criteria deficiencies.

(IV) If the designation review committee disagrees with the office's recommendation for corrective actions, the case shall be referred to the assistant commissioner for recommendation to the commissioner.

(V) If a facility disagrees with the office's recommendation at the end of the secondary review process, the facility has a right to a hearing, in accordance with the department's rules for contested cases and Government Code, Chapter 2001.

(VI) Designated trauma facilities seeking exceptions to essential criteria shall have the right to withdraw the request at any time prior to resolution of the final appeal process;

(6) notify the office; its RAC plus other affected RACs; and the healthcare facilities to which it customarily transfers-out trauma patients or from which it customarily receives trauma transfers-in, if it no longer provides trauma services commensurate with its designation level.

(A) If the facility chooses to apply for a lower level of trauma designation, it may do so at any time; however, it shall be necessary to repeat the designation process. There shall be a paper review by the office to determine if and when a full survey shall be required.

(B) If the facility chooses to relinquish its trauma designation, it shall provide at least 30 days notice to the RAC and the office; and

(7) within 30 days, notify the office; its RAC plus other affected RACs; and the healthcare facilities to which it customarily transfers-out trauma patients or from which it customarily receives trauma transfers-in, of the change(s) if it adds capabilities beyond those that define its existing trauma designation level.

(A) It shall be necessary to repeat the trauma designation process.

(B) There shall then be a paper review by the office to determine if and when a full survey shall be required.

(t) Any facility seeking trauma designation shall have measures in place that define the trauma patient population evaluated at the facility and/or at each of its locations, and the ability to track trauma patients throughout the course of their care within the facility and/or at each of its locations in order to maximize funding opportunities for uncompensated care.

(u) A healthcare facility may not use the terms "trauma facility", "trauma hospital", "trauma center", or similar terminology in its signs or advertisements or in the printed materials and information it provides to the public unless the healthcare facility is currently designated as a trauma facility according to the process described in this section.

(v) The office shall have the right to review, inspect, evaluate, and audit all trauma patient records, trauma performance improvement committee minutes, and other documents relevant to trauma care in any designated trauma facility or applicant/healthcare facility at any time to verify compliance with the statute and this rule, including the designation criteria. The office shall maintain confidentiality of such records to the extent authorized by the Texas Public Information Act, Government Code, Chapter 552, and consistent with current laws and regulations related to the Health Insurance Portability and Accountability Act of 1996. Such inspections shall be scheduled by the office when deemed appropriate. The office shall provide a copy of the survey report, for surveys conducted by or contracted for the department, and the results to the healthcare facility.

(w) The office may grant an exception to this section if it finds that compliance with this section would not be in the best interests of the persons served in the affected local system.

(x) Advanced (Level III) Trauma Facility Criteria.
Figure: 25 TAC §157.125(x)

(1) Advanced (Level III) Trauma Facility Criteria Standards.
Figure: 25 TAC §157.125(x)(1)

(2) Advanced (Level III) Trauma Facility Criteria Audit Filters.
Figure: 25 TAC §157.125(x)(2)

(y) Basic (Level IV) Trauma Facility Criteria.
Figure: 25 TAC §157.125(y)

(1) Basic (Level IV) Trauma Facility Criteria Standards.
Figure: 25 TAC §157.125(y)(1)

(2) Basic (Level IV) Trauma Facility Criteria Audit Filters.
Figure: 25 TAC §157.125(y)(2)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2006.

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Cathy Campbell
General Counsel
Department of State Health Services
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For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER LL. HEALTH COVERAGE AWARENESS AND EDUCATION PROGRAM

28 TAC §§3.9301 - 3.9306

The Commissioner of Insurance adopts new Subchapter LL, §§3.9301 - 3.9306, concerning gifts, grants, and donations to the Texas Department of Insurance for the Health Coverage Awareness and Education Program. Sections 3.9303 - 3.9306 are adopted with changes to the proposed text as published in the October 13, 2006, issue of the *Texas Register* (31 TexReg 8463). Section 3.9301 and §3.9302 are adopted without changes.

The new sections are necessary to implement Senate Bill (SB) 261, enacted by the 79th Legislature, Regular Session, which added Chapter 524 to the Insurance Code. SB 261 requires the Department to develop public educational programs that disseminate pertinent information about health coverage options, including health savings accounts and compatible high deductible health benefit plans, and authorizes the Department to accept gifts, grants, and donations for this purpose. In addition, Chapter 524 required the Department to submit the proposed rules to the Texas Ethics Commission for review and to consider the recommendations of the Commission before adopting the proposed rules. The Department submitted the proposed rules to the Texas Ethics Commission, considered the recommendations from the Commission, and incorporated several of the recommendations from the Commission.

The Department has changed some of the proposed language in the text of the rule as adopted in response to written comments and has made other changes for purposes of clarification and readability. The changes do not introduce new subject matter or affect persons in addition to those subject to the proposal as published. Changes were made to §3.9305(a) and (d) in response to comments received. A commenter said that §3.9305(a) should be changed to require that an offeree give notice that it is not subject to one of the situations described in the subsection, rather than when it is subject to one of the situations. The Department agrees in part, and has modified the subsection to require that an offeree give notice of whether it is subject to one of the situations described in the subsection. A commenter asked that §3.9305(d) be modified to track the language of §3.9305(a) more closely, and the requested change has been made. In addition to these changes, the Department has made non-substantive minor editorial changes in §§3.9303(a) and (c),

3.9304(b)(1), 3.9305(a)(1) - (3), and 3.9306(c) for purposes of clarification and readability. Adopted §3.9303(a) and §3.9306(c) have been changed to place the subsections in an active rather than passive voice. Adopted §3.9304(b)(1) has been changed to reflect more clearly the bid acceptance process of the Department. Adopted §3.9305(a)(1) - (3) has been changed for purposes of grammatical consistency, clarification, and readability.

Section 3.9301 specifies that the purpose of the subchapter is to establish procedures regarding the Department's acceptance of donations for assistance in the funding of the Health Coverage Awareness and Education Program and to establish procedures to govern the relationship between employees of the Department, offerees, and donors regarding the acceptance of such donations. Section 3.9302 sets forth definitions for use in the subchapter. Section 3.9303 prescribes that the Commissioner or the Commissioner's designee may accept donations on behalf of the Department and that all donations become state property and are subject to applicable federal and state laws and regulations. While §3.9303 provides that the Commissioner or the Commissioner's designee may accept a donation in the manner authorized by the section, §3.9303 makes clear that only the Commissioner, in the Commissioner's sole discretion, may decline to accept a donation. Section 3.9304 establishes limitations for offerees and donors. Section 3.9304(a) addresses offerees that are seeking to contract with the Department. Section 3.9302(10) defines the term seeking to contract as submitting a bid response to the Department. Under §3.9304(a), an offeree who submits a bid response to the Department, including a formal bid response, a formal bid proposal, an informal price quote, a submission of specifications or qualifications, or direct contract negotiations, must notify the Department of this fact in a form acceptable to the Department. Additionally, §3.9304(a) requires offerees seeking to contract with the Department to disclose all previous donations made to the Department or any other state agency within the preceding two years. Section 3.9304(b) prohibits an offeree who has submitted a bid response to the Department from making a donation to the Department from the date the bid response is submitted to the Department until a date subsequent to the award of the bid. If the Department awards the bid to the offeree, that date is one year after the award. If the Department does not award the bid to the offeree, that date is the 90th day after the award. Lastly, §3.9304(c) prohibits a donor from submitting a bid response to the Department for a period of one year following the date the donation agreement was executed by the donor and the Commissioner or by the donor and the Commissioner's designee. Section 3.9305 establishes limitations for entities that are subject to Department regulation pursuant to the Insurance Code, the Labor Code, and federal law. Section 3.9305(a) establishes that, prior to executing the donation agreement described by §3.9306 (relating to Procedures for Acceptance of Donations), an offeree that is subject to Department regulation pursuant to the Insurance Code, the Labor Code, or federal law, shall notify the Department of whether the offeree is the subject of an open investigation or enforcement action of the Department; is applying for a certificate of authority, license, or other Department issued permit; is seeking a letter of consent pursuant to 18 U.S.C. §1033; or is the subject of an enforcement action of another state agency. Section 3.9305(b) requires that licensees; certificate holders; permit holders; applicants for a license, certificate of authority, or other Department issued permit; individuals requesting letters of consent pursuant to 18 U.S.C. §1033; and employers, employees, and providers who engage in the business of insurance or participate in the worker's compensation system in this state are subject to the provisions of the section. Section 3.9305(c) requires the §3.9305(a) notification to include the docket number, style, and filing date of an enforcement action, if applicable. Section 3.9305(d) prohibits an offeree that is subject to subsection (a) of the section from making a donation to the Department from the date that the Department initiates an open investigation or enforcement action against the offeree; the offeree applies for a certificate of authority, license, or other Department issued permit; the offeree requests a letter of consent pursuant to 18 U.S.C. §1033; or another state agency initiates an enforcement action against the offeree until the 90th day after the date the Department or other state agency closes its open investigation or reaches final disposition in its enforcement action; the Department issues or denies the certificate of authority, license, or other Department issued permit; or the Department provides or refuses to provide a letter of consent pursuant to 18 U.S.C. §1033. This provision imposes a longer time period than is prescribed in the Government Code §575.005, which requires that a state agency may not accept a gift from a person who is a party to a contested case before the agency until the 30th day after the date the decision in the case becomes final under §2001.144 of the Government Code. Lastly, §3.9305(e) specifies that the notification required by subsection (a) of the section is not required for form filings, data calls, or other matters not specified in subsection (a) of the section. Prior to accepting a donation, §3.9306(a) requires the offeree and the Commissioner or the Commissioner's designee to execute a donation agreement that must include several pieces of information, including a description of the donation; the name and signature of the offeree; the purpose of the donation; a statement identifying whether the disclosures required by §3.9304 and §3.9305 of this subchapter (relating to Limitations on Offerees and Donors and Limitations on Entities Subject to Department Regulation) are applicable to the offeree and, if so, whether the disclosures have been tendered in a form acceptable to the Department; and a statement advising the offeree to seek any desired legal and/or tax advice from its own legal counsel. Section 3.9306(b) provides that the Commissioner or the Commissioner's designee may accept grant money only after the offeree and the Commissioner or the Commissioner's designee have executed the donation agreement required in subsection (a) of the section. Section 3.9306(c) requires the Commissioner or the Commissioner's designee to deposit in accordance with state law all monetary contributions received from donations made pursuant to the Insurance Code §524.005 and to use all monetary contributions received from donations for purposes consistent with §524.005.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

§3.9302(1)

Comment: A commenter seeks clarification of the definition for bid response in §3.9302(1), asking in particular what is considered a similar submission or communication. The commenter asks if a health plan would be allowed to make a donation if it is bidding to serve as the administrator of the Texas Health Insurance Risk Pool. The commenter also notes that TDI is currently assisting in development of a small employer insurance plan in the Houston area and asks if an entity that made a donation to TDI would be prohibited from bidding to administer or provide this plan.

Agency Response: A similar submission or communication would be a submission or communication that is given in response to a departmental request for goods or services and that contains the same information or conveys the same intent as the types of responses noted in the definition of bid response.

The Risk Pool's Board of Directors, not the Department, administers the Texas Health Insurance Risk Pool. As such, an entity seeking to serve as administrator of the Risk Pool would submit a bid to the Risk Pool Board, not the Department. The Harris County Healthcare Alliance, not the Department, is administering the small employer insurance plan the commenter described. As such, an entity seeking to administer or provide this plan would submit a bid to the Harris County Healthcare Alliance rather than to the Department.

§3.9305(a)(1) - (4)

Comment: A commenter suggests that the Department revise the rule proposal to provide that potential donors notify the Department if they are not involved in any of the situations described in §3.9305(a)(1) - (4), rather than requiring potential donors to fill out a form that states they are involved in such a situation and therefore cannot make a contribution until the 90th day after final disposition.

Agency Response: The Department agrees in part with this comment and disagrees in part. The Department recognizes that to allow an offeree to state that it is not subject to a situation described in subsection (a)(1) - (4), as requested by the commenter, would promote efficiency and clarify communication between an offeree and the Department. However, it is important that the Department be notified when an offeree is subject to a situation described in subsection (a)(1) - (4), because with such information the Department can more quickly verify whether an offeree is qualified to make a donation. For this reason, proposed subsection (a) has been changed to specify that an offeree must notify the Department whether it is subject to a situation described in subsection (a)(1) - (4). As requested by the commenter, an offeree not subject to a specified situation must notify the Department of that fact; but if an offeree is subject to a specified situation, it also must notify the Department accordingly. In addition to changes in response to the comment, changes have been made to the text of subsection (a)(1) - (3) for purposes of grammatical consistency, clarification, and readability.

Comment: In regard to §3.9305(a)(1) and (4), a commenter seeks clarification as to what constitutes an open investigation or an enforcement action by TDI or another state agency. The commenter notes that health plans receive letters regarding every complaint filed with TDI and asks if such a letter constitutes an open investigation. The commenter says that the proposed rule is specific to a contested case with a notice of intent, report to the Commissioner, or a notice of hearing. The commenter says that without clarification, the proposed language is overly broad and could serve to severely restrict donations.

Agency Response: An open investigation and an enforcement action are parts of an open enforcement action. An open enforcement action commences when the Department's Enforcement Division opens a file at the beginning of an investigation. Other departmental action, however, such as tendering a letter to a carrier regarding a consumer complaint, may also open an enforcement action. Thus if an offeree has received such a letter, it should notify the Department of the letter so the Department may determine whether the offeree is the subject of an open enforcement action and thus disqualified from donating.

§3.9305(d)

Comment: A commenter says that §3.9305(d) should be revised to track the language of §3.9305(a) more closely. The commenter adds that further clarification of when any such action is considered to be initiated would also be useful.

Agency Response: The Department agrees and has changed §3.9305(d) accordingly. The point of initiation depends on which event in subsection (a) is referenced. In the first instance, the Department would initiate by opening a file. In the second and third instance, the offeree would initiate, either by submitting an application or a request to the Department, and the initiation date would be the date of submission. In the fourth instance, another state agency would initiate by taking the necessary measures to prosecute an enforcement action. The initiation date would be the date the state agency gives notice to the offeree that it is proceeding with an enforcement action.

NAMES OF THOSE COMMENTING FOR AND AGAINST THE PROPOSAL.

For, with changes: Texas Association of Health Plans.

Against: None.

The sections are adopted pursuant to the Insurance Code §524.005 and §36.001. Insurance Code §524.005 requires the Department to adopt rules governing the acceptance of donations that will fund the Health Coverage Awareness and Education Program and requires that these rules be consistent with the Government Code Chapter 575. Section 36.001 provides that the Commissioner of Insurance may adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

§3.9303. Acceptance of Donations.

(a) The commissioner or the commissioner's designee may accept a donation only for the purposes authorized in the Insurance Code Chapter 524 in the manner authorized in this subchapter. The commissioner or the commissioner's designee must accept all donations on behalf of the department and not in an individual capacity.

(b) The commissioner, in the commissioner's sole discretion, may decline to accept any donation.

(c) Donations the commissioner or the commissioner's designee accept become state property and are subject to all applicable federal and state laws and regulations.

§3.9304. Limitations on Offerees and Donors.

(a) Prior to executing the donation agreement described by §3.9306 of this subchapter (relating to Procedures for Acceptance of Donations), an offeree seeking to contract with the department shall:

(1) notify the department, in a form acceptable to the department, that the offeree is seeking to contract with the department; and

(2) disclose all previous donations made to the department or any other state agency within the preceding two years. The disclosure shall be in a form acceptable to the department and shall include the nature and value of the donation and the date the donation was made. If the donation is ongoing, the date of the donation shall be the last date the donation was delivered to the department or other state agency.

(b) An offeree who has submitted a bid response to the department may not make a donation from the date the offeree submits the bid response until a date subsequent to the award of the bid, as paragraphs (1) and (2) of this subsection specify.

(1) If the department awards the bid to the offeree, one year after the award of the bid; or

(2) if the department does not award the bid to the offeree, the 90th day after the award of the bid.

(c) A donor who has made a donation to the department may not submit a bid response to the department for a period of one year following the date the donation agreement was executed by the donor and the commissioner or by the donor and the commissioner's designee.

§3.9305. Limitations on Entities Subject to Department Regulation.

(a) Prior to executing the donation agreement described by §3.9306 of this subchapter (relating to Procedures for Acceptance of Donations), an offeree subject to department regulation pursuant to the Insurance Code, the Labor Code, or federal law, must notify the department, on a completed form that is acceptable to the department, whether the offeree:

(1) is the subject of an open investigation or enforcement action of the department;

(2) has applied for a certificate of authority, license, or other department issued permit;

(3) is seeking a letter of consent pursuant to 18 U.S.C. §1033; or

(4) is the subject of an enforcement action of another state agency.

(b) Individuals and entities subject to subsection (a) of this section include:

(1) licensees; certificate holders; permit holders; applicants for a license, certificate of authority, or other department issued permit;

(2) individuals requesting letters of consent pursuant to 18 U.S.C. §1033; and

(3) employers, employees, and providers who engage in the business of insurance or participate in the worker's compensation system in this state.

(c) The notification required in subsection (a) of this section must include the docket number, style, and filing date of the enforcement action, if applicable.

(d) An offeree subject to subsection (a) of this section may not make a donation to the department from the date the department initiates an open investigation or enforcement action against the offeree; the offeree applies for a certificate of authority, license, or other department issued permit; the offeree requests a letter of consent pursuant to 18 U.S.C. §1033; or another state agency initiates an enforcement action against the offeree; until the 90th day after the date the department or other state agency closes its open investigation or reaches final disposition in its enforcement action; the department issues or denies the certificate of authority, license, or other department issued permit; or the department provides or refuses to provide a letter of consent pursuant to 18 U.S.C. §1033.

(e) A notification pursuant to subsection (a) of this section is not required for form filings, data calls, or other matters not specified in subsection (a) of this section.

§3.9306. Procedures for Acceptance of Donations.

(a) Donation agreement. Prior to accepting any donation, the offeree and the commissioner or the commissioner's designee shall execute a donation agreement that includes the following information:

(1) the name of the offeree;

(2) a description of the donation, including a determination of the value;

(3) a statement by the offeree attesting to its ownership rights in the property, including intellectual property ownership rights;

(4) the signature of the offeree if the offeree is an individual or its official representative if the offeree is a business organization;

(5) the signature of the commissioner or the commissioner's designee;

(6) the purpose of the donation;

(7) the mailing address of the offeree and principal place of business if the offeree is a business entity;

(8) a statement identifying any official relationship between the offeree and the department;

(9) a statement identifying whether the disclosures required by §3.9304 and §3.9305 of this subchapter (relating to Limitations on Offeree and Donors and Limitations on Entities Subject to Department Regulation) are applicable to the offeree, and, if so, whether the offeree has tendered the disclosures to the department in a form acceptable to the department; and

(10) a statement advising the offeree to seek any desired legal and/or tax advice from its own legal counsel.

(b) Grants. The commissioner or the commissioner's designee may accept grant money only after the offeree and the commissioner or the commissioner's designee have executed the donation agreement required in subsection (a) of this section.

(c) Deposited funds. The commissioner or commissioner's designee shall deposit in accordance with state law all monetary contributions received from donations made pursuant to the Insurance Code §524.005 and shall use all such contributions for purposes consistent with §524.005.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2006.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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Proposal publication date: October 13, 2006
For further information, please call: (512) 463-6327

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PART 2. TEXAS DEPARTMENT OF INSURANCE, DIVISION OF WORKERS' COMPENSATION

CHAPTER 102. PRACTICES AND PROCEDURES--GENERAL PROVISIONS

28 TAC §102.11

The Commissioner of the Division of Workers' Compensation, Texas Department of Insurance, adopts new §102.11, concerning electronic formats for electronic claim data request and report. The new section is adopted with changes to the proposed

text as published in the September 22, 2006, issue of the *Texas Register* (31 TexReg 8077).

The 77th Texas Legislature, Regular Session, 2001, enacted House Bill (HB) 1562, amending Labor Code §402.084 to authorize the Texas Workers' Compensation Commission, now the Division, to establish by rule a reasonable fee for information requested in an electronic data form by subclaimants or their representatives to control insurance fraud. The 79th Texas Legislature, Regular Session, 2005, enacted HB 251, amending Labor Code §402.084 to require the Division to release to an insurance carrier certain data, on request, that will allow the carrier to identify potential subclaims and pursue recovery allowed under Labor Code §409.009. HB 251 authorizes the Division to establish by rule a reasonable fee not to exceed five cents for each claimant listed in an information request.

The section is necessary to implement a system that uses a computer program developed by the Division, which compares information submitted from potential subclaimants, or their representatives, to information contained in workers' compensation claim data. The system will provide information in a secure manner to insurance carriers that will assist them in determining if they provided health insurance coverage for claims that have related workers' compensation claims.

The Division met with stakeholders and invited input on HB 251. Following publication of the proposed new section in the *Texas Register* on September 22, 2006, the Division received three comments. In response to written comments received from interested parties, the Division has changed some of the language in the text of the rule as adopted. The changes do not introduce new subject matter or affect persons in addition to those subject to the proposal as published. The Division revised subsection (e) to eliminate redundancy and subsection (h) to clarify that an insurance carrier is not required to demonstrate that a subclaim exists to request claims information from the Division.

Section 102.11 provides the purpose, defines words and terms associated with the electronic claim data request and report, details the elements that a data request must contain, describes the required information that a report must contain, and describes who can be a requesting party. The section also describes the process the Division will use to match request data to workers' compensation claim data and addresses security and confidentiality. The section establishes the frequency for requests and the fees associated with the requests. The section also requires the requester to execute an agreement with the Division regarding the requested data, and sets out the requirements of such an agreement. Further, the section contains provisions for injured employee notification and the elements a notification must include.

General comments.

Comment: A commenter states that the Division should create a process for insurance carriers to be reimbursed without entering into the Division subclaim process. The commenter states that the Division misinterprets Labor Code §409.009 and limits access to the Division's dispute resolution process to those disputes between subclaimants that contest compensability of an injury or illness. According to the commenter, a health care insurer who meets the two elements of §409.009 has no administrative remedy. The commenter's position is that the Division has explicit authority through Labor Code §410.024 to create an administrative remedy for insurance carriers who meet the elements of §409.009 but are not otherwise involved in a workers' compensation case. The commenter proposes language be added to the rule to create an arbitration process which would require a workers' compensation carrier to make direct reimbursement to a health care insurer for compensable medical benefits that were wrongly paid by the health care insurer.

Agency Response: HB 251 relates to the release of certain information regarding workers' compensation claims and does not include or create an arbitration process for reimbursement of health care insurers. Section 102.11 implements a system for exchanging data regarding workers' compensation claims for certain requesters. The Division lacks statutory authority to create an arbitration process for health care insurers to obtain reimbursement from workers' compensation carriers. Furthermore, the Division disagrees that Labor Code §409.009 is misinterpreted because if a health care insurer meets the elements of §409.009 they may file a written claim with the Division.

Comment: A commenter recommends the Division publish a draft implementation guide and seek stakeholder input prior to adoption of the rule. The commenter further states that any revisions to the guide should be made with at least 90 days notice to allow stakeholders sufficient time to make programming changes.

Agency Response: HB 251 provides clear instruction to adopt rules to implement a process for the exchange of electronic data. HB 251 does not require an implementation guide prior to adoption of the rule. The Division notes that a pilot program for electronic data exchange is already being utilized by trading partners. The Division wants to assure the commenter that it will publish the implementation guide and obtain stakeholder feedback prior to finalizing the implementation guide and sufficient notice will be provided to stakeholders to allow for necessary system or process changes.

Subsection (e), Claim data request

Comment: A commenter recommends deleting subsection (e) because it is redundant since subsection (b)(5) already defines requester using the definition from Labor Code §402.084(b)(8). The commenter states that the statute does not allow a request to be submitted by an agent acting on behalf of an authorized entity.

Agency Response: The Division acknowledges that the subsection may be redundant and has changed subsection (e) to clarify the process for requesting information. The Division disagrees that the statute does not allow a request to be submitted by an agent acting on behalf of an authorized entity because Labor Code §402.084(b)(8) and (c-3) states that an insurance carrier or the authorized representative of the insurance carrier may submit a written request for claims information.

Subsection (h), Claims information

Comment: A commenter states that the proposed rule is required to implement HB 251 and to allow the release of workers' compensation claim information to an insurance carrier that has adopted an anti-fraud plan. The commenter further states that subsection (h) prevents an insurance carrier from obtaining claims information from the Division without pursuing status as a formal subclaimant, and that subsection (h) as drafted violates the Labor Code §408.084(c)(2) and the legislative intent of HB 251. Another commenter recommends deleting language in subsection (h) which requires requesters to destroy claim data records which are not necessary to pursue subclaimant status

or reimbursement by the insurance carrier. The commenter contends that requesters may need this information to reconcile charges from the Division or to later recreate transmissions that are, later determined, not to have been received. The commenter is also concerned about the cost of destroying electronic records.

Agency Response: The Division disagrees that subsection (h) prevents an appropriate insurance carrier from obtaining claims information because subsection (e) allows requests from entities, including appropriate insurance carriers that are authorized by §408.024. However, the Division has clarified subsection (h) by deleting the first sentence to eliminate any confusion about appropriate requesters. The Division disagrees with the comment to delete the language which requires requesters to destroy certain information. Labor Code §402.084(d) requires the Division to adopt rules under §401.024(d) to establish reasonable security parameters for the transfer of information and to establish requirements for the maintenance of requested electronic data. Carriers and their agents, or authorized representatives, must execute and enter into a written agreement, regarding the security parameters, with the Division prior to carriers request for information. Labor Code §402.084 authorizes a process for electronic exchange of data so that an insurance carrier can determine if a workers' compensation claim exists for individuals insured by the insurance carrier. Accordingly, the section implements a process for carriers to identify potential subclaims and pursue appropriate reimbursement, by submitting a list of persons that are certified as insureds of the carrier to the Division to obtain workers' compensation claim information for those persons. Information obtained which is not necessary for this process exceeds the statutory authority of Labor Code §402.084 and subsection (h) is within the purview of the Labor Code and HB 251.

For with changes: MedRecovery Management, Texas Mutual Insurance Company and the 4600 Texas Group.

Against: None.

The section is adopted under Labor Code §§402.084, 401.024, 409.009, 402.00111, and 402.061. Section 402.084 provides for the exchange of information between requesters and the Division to determine if a workers' compensation claim exists. It also authorizes the Commissioner of Workers' Compensation to establish by rule a reasonable fee, not to exceed five cents for each claimant listed in a request. Further, it requires the Commissioner of Workers' Compensation to adopt rules under §401.024(d) to establish reasonable security parameters and requirements regarding the maintenance of electronic data in the possession of an insurance carrier. Section 401.024 allows the Commissioner of Workers' Compensation to prescribe the form, manner, and procedure for transmitting any authorized or required electronic transmission. Section 409.009 sets out the situations when a person may file a written claim with the Division as a subclaimant. Section 402.00111 provides that the Commissioner of Workers' Compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides the Commissioner of Workers' Compensation the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

§102.11. Electronic Formats for Electronic Claim Data Request and Report.

(a) The Division prescribes standard electronic formats by utilizing implementation guides for data requests and data reports for the purpose of exchanging data between the Division and insurance carriers, as defined in Labor Code §402.084.

(b) The following words and terms, when used in this section, shall have the following meanings:

(1) Claim Data Request and Report Implementation Guide (Guide)--The Division specification document for the Claim Data Request and the Claim Data Report that defines specific data requirements, data set transactions, data mapping, data edits and fees per record available at *www.tdi.state.tx.us/wc*.

(2) Claim Data Report--The electronic report generated by the Division in the format specified by the Guide. The report contains data for claims meeting confidence match criteria defined in the Guide.

(3) Claim Data Request--The electronic request submitted by a requester in the format specified by the Division in the Guide.

(4) Record--An electronic representation of one insured person containing a set of unique identifiers including the full name, date of birth, gender, and social security number, if available. Each set of individual identifiers included in a Claim Data Request represents a separate record.

(5) Requester--An insurance carrier that has adopted an antifraud plan under Labor Code §402.084(b)(8) and qualifies as an insurance carrier under Labor Code §402.084(c-1) or its authorized representative.

(c) A Claim Data Request must contain the following elements:

(1) all fields required in the applicable Guide as defined in subsection (b) of this section;

(2) complete, current and correct values as described in the applicable Guide; and

(3) records of persons who are or were valid members of the requesters' benefit programs and whose claims may be related to a workers' compensation claim.

(d) A Claim Data Report must contain:

(1) all fields required in the applicable Guide; and

(2) complete, current and correct values as described in the applicable Guide.

(e) A Claim Data Request may be submitted by a requester.

(f) The Division will match the records submitted by a requester against the Division's claim data using a matching methodology published in the Guide. The search will include all claims on record with the Division relating to injuries sustained on or after September 1, 2002. For each record submitted, the Division will report:

(1) the existence of a positive match with one or more workers' compensation claims; or

(2) the failure to match the record to any recorded workers' compensation claim.

(g) File transfers between requesters and the Division shall be sent using secured file transfer protocol (SFTP) with access controlled by a unique username and password.

(h) The data shall not be shared or disclosed to any other person or entity, except as necessary to document and pursue reimbursement with the appropriate workers' compensation carrier or claims administrator or through Division dispute resolution procedures. Requesters shall destroy all electronic or paper records related to Claim

Data Requests that are not needed to pursue subclaimant status or recovery of reimbursement by an insurance carrier as defined by Labor Code §402.084(c-1).

(i) A requester may submit a Claim Data Request once every 30 days for each covered individual.

(j) Unless waived by the Division, the requester shall pay to the Division a fee for each record included in a request. The fee will be established in the Guide, but shall be no more than $.05 for each record included in the Claim Data Request. Claim Data Requests that include previously submitted requests for records would also be charged a fee of up to $.05 for each record.

(k) Prior to submitting a Claim Data Request, the requester shall execute a trading partner agreement with the Division in the form and manner prescribed by the Division. The trading partner agreement shall contain:

(1) a statement that the requester agrees to abide by all applicable federal and state laws and regulations;

(2) an agreement to submit only names and identifying information related to bona fide beneficiaries of the requester's benefit plans;

(3) an agreement to comply with Division standards for secure transfer and storage of workers' compensation claim information;

(4) an agreement to comply with Division standards regarding the confidentiality of workers' compensation claim information and the approved uses of that information; and

(5) an agreement to pay applicable fees.

(l) After a match of a record has been determined, the information may be used by the requester as the basis for identification and filing of a subclaim under Labor Code §409.009. When a match has been determined and a subclaim filed, the requester shall contact the injured employee who received the health care and is the subject of the subclaim. The requester shall provide the injured employee written notice, which includes the following:

(1) the name of the subclaimant;

(2) the dates of service;

(3) the name of the injured employee;

(4) a statement declaring, "As the injured employee in this matter, you will receive notice of all proceedings related to this matter and may participate in those proceedings. To determine whether to take any action in this matter, you may wish to consult with an attorney. You can also contact the Office of Injured Employee Counsel (OIEC) for ombudsman assistance."; and

(5) the phone number and website address of OIEC.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2006.

TRD-200606592

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Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4288

CHAPTER 133. GENERAL MEDICAL PROVISIONS

SUBCHAPTER D. DISPUTE AND AUDIT OF BILLS BY INSURANCE CARRIERS

28 TAC §§133.305, 133.307, 133.308

The Commissioner of the Division of Workers' Compensation, Texas Department of Insurance, adopts the repeal of §§133.305, 133.307, and 133.308, concerning medical dispute resolution (MDR). The repeal of these sections is adopted without changes to the proposal published in the June 23, 2006, issue of the *Texas Register* (31 TexReg 5042).

The repeal of these sections is necessary for the Division to adopt new §§133.305, 133.307, and 133.308, published elsewhere in this issue of the *Texas Register*. These new sections are necessary to: implement statutory provisions of HB 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005; address the merger of two agencies with similar purposes and processes; and improve efficiencies within the MDR process.

The adopted new sections govern dispute resolution of workers' compensation medical necessity and medical fee disputes. The adopted sections incorporate new processes, which simplify the administrative processing for stakeholders and allow for a more efficient and consistent method of processing and resolving medical disputes. The new sections apply to medical necessity and fee disputes filed on or after January 15, 2007.

The Division did not receive any comments on the proposal.

The repeal is adopted under Labor Code §§408.027(g), 408.0271, 408.031, 413.002, 413.020, 413.031, 413.032, 401.024, 402.00111, and 402.061. Labor Code §408.027(g) provides that §408.027 and §408.0271 apply to health care provided through a workers' compensation health care network established under Insurance Code Chapter 1305 and that the commissioner of workers' compensation shall adopt rules as necessary to implement the provisions of §408.027 and §408.0271. Section 408.0271 states that if health care services provided to an employee are determined by the carrier to be inappropriate, the carrier shall notify the provider in writing of the carrier's decision and demand a refund of the portion of payment on the claim received by the provider for the inappropriate services and the provider may appeal such a carrier's determination no later than the 45th day after the date of the carrier's request for the refund. Section 408.031(a) allows injured employees to receive benefits under a workers' compensation health care network established under Insurance Code Chapter 1305. Section 413.002(d) provides that if the commissioner determines that an Independent Review Organization (IRO) is in violation of Labor Code Chapter 413, rules adopted by the commissioner under Chapter 413, applicable provisions of Labor Code Title 5, the commissioner or a delegated representative shall notify the IRO of the alleged violation and may compel the production of

any documents or other information as necessary to determine whether the violation occurred. Section 413.020 provides the authority to adopt rules that enable the Division to charge a carrier a reasonable fee for access to or evaluation of health care treatment, fees, or charges. The section also provides that the Division may charge a provider who exceeds a fee or utilization guideline or a carrier who unreasonably disputes charges that are consistent with a fee or utilization guideline a reasonable fee for review of health care treatment, fees, or charges. Section 413.031 specifies the processes for an IRO decision and appeal and states that the commissioner by rule shall specify the appropriate dispute resolution process for fee disputes in which a claimant has paid for medical services and seeks reimbursement. Section 413.032(a) provides that an IRO that conducts a review under Chapter 413 shall specify the minimum elements on which the IRO decision is based. Section 401.024 authorizes the commissioner to require by rule the use of facsimile or other electronic means to transmit information. Section 402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides that the commissioner of workers' compensation has the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2006.

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Texas Department of Insurance, Division of Workers' Compensation
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For further information, please call: (512) 804-4288

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SUBCHAPTER D. DISPUTE OF MEDICAL BILLS

28 TAC §§133.305, 133.307, 133.308

The Commissioner of the Division of Workers' Compensation, Texas Department of Insurance, adopts new §§133.305, 133.307, and 133.308, concerning medical dispute resolution (MDR). The sections are adopted with changes to the proposed text as published in the June 23, 2006, issue of the *Texas Register* (31 TexReg 5044).

These sections are necessary to: implement statutory provisions of House Bill (HB) 7, enacted by the 79th Legislature, Regular Session, effective September 1, 2005; address the merger of two agencies with similar purposes and processes; and improve efficiencies within the MDR process.

Sections 133.305, 133.307, and 133.308 are necessary to implement HB 7 amendments to Labor Code §413.031 and new Labor Code §413.032 to conform the MDR process for medical disputes arising from non-network care or from certain authorized out-of-network care with the overall stated system aims of HB 7 as provided in Labor Code §402.021 (b)(3) - (9). HB 7 amended Labor Code §408.027 relating to payment of health care providers and added Labor Code §408.0271 relating to reimbursement by health care provider. The sections are necessary to implement and clarify the changes to the Labor Code regarding payment and reimbursement that affect the dispute resolution process. HB 7 also added §413.0111 to the Labor Code relating to processing agents. The sections are necessary to implement the provisions of Labor Code §413.0111 and establish requirements and procedures for pharmacies to use pharmacy processing agents or assignees to process claims under the terms and conditions agreed on by the pharmacies. Additionally, the sections implement HB 7 amendments to Labor Code §413.031 regarding independent review organization (IROs) and implement new Labor Code §413.032 regarding IRO decisions and appeals. The sections establish the binding effect of IRO decisions, specify elements of the IRO decision, and institute quality monitoring of IROs. HB 7 further provides direct judicial review for an appeal from an IRO or from the Division, thus removing the State Office of Administrative Hearings (SOAH) layer from the MDR process. These HB 7 changes to the MDR process are implemented in the sections. The Commissioner also adopts the simultaneous repeal of existing §§133.305, 133.307, and 133.308, published elsewhere in this issue of the *Texas Register*.

The Division posted an informal draft of the new sections relating to MDR on February 13, 2006 and invited public input, which included a stakeholder meeting on March 9, 2006. Following publication of the proposed new sections in the *Texas Register* on June 23, 2006, the Division held a public hearing on July 26, 2006, and received comments suggesting changes to the proposed sections. In response to comments made at the hearing and written comments from interested parties, the Commissioner is adopting these sections with some changes to the proposal as published. Throughout the adopted rule, the Division has made editorial and grammatical changes to the rule, as proposed, for clarity. The Division also updated references to the Insurance Code throughout the rule as the result of the enactment of the nonsubstantive revision of the Insurance Code by the 79th Legislature, Regular Session, HB 2017, which are effective April 1, 2007. The adopted sections should be read in conjunction with Labor Code §413.031 and §413.032, and other statutes and rules as applicable.

§133.305. In subsection (a)(1), as adopted, the Division has added a definition of *adverse determination* for clarification that MDR intake requires a sufficient method, which meets the definition of *adverse determination*, to determine that an issue of medical necessity exists and dismiss the request for resolution of fee disputes. In response to a comment that a definition of *life-threatening condition* should be added to the definitions, the Division has added a definition of *life-threatening* in subsection (a)(2), as adopted, that mirrors the definition in Insurance Code Article 21.58A, §2(12). In response to a comment that Labor Code §413.0111 does not confer health care provider status on pharmacy processing agents and concern that §133.308(e)(1) unintentionally assigned such status, the Division has revised the references to pharmacy processing agents in §§133.305(a)(2)(A) ((a)(4)(A) as adopted), 133.307(b)(1), and 133.308(e)(1) by adding the words or a after the word *provider* and deleting the words *which includes* or *including* before the term *pharmacy processing agent(s)*. In subsection (a)(2)(B) ((a)(4)(B) as adopted), in response to a comment to clarify when an employee may request MDR, the words *a carrier* have

been deleted to clarify that an injured employee may request MDR when a carrier or a health care provider denies the injured employee's refund request. In subsection (a)(2)(C) ((a)(4)(C) as adopted) and §133.307(b)(2), in response to comments, the words *or carrier* were added after the words *a Division* and before the word *audit* to clarify that an insurance carrier, in addition to the Division, may request a health care provider refund after a carrier audit or review pursuant to Labor Code §408.0271. In response to a comment that the definition of *network health care* conflicts with 28 TAC §§10.102(i), 10.103(a)(4)(B)(iv), and 10.104(a)(2), the Division has revised subsection (a)(3) and (4), ((a)(5) and (6) as adopted) by adding the words or arranged to clarify that such networks may contract to provide health care. Subsection (a)(3) ((a)(5) as adopted) has also been revised by adding the words *including authorized out-of-network care* before the words *health care network* and *as defined* to clarify that *network health care* includes authorized out-of-network health care. In response to a comment regarding the processing of medical necessity and compensability related disputes prior to resolution of fee disputes, the Division has rewritten the language in subsection (b) to clarify that dispute resolution for compensability, extent of injury, liability, and/or medical necessity must be resolved prior to the submission of a medical fee dispute for the same services in accordance with Labor Code §413.031 and §408.021. In subsection (c)(4), in response to comments asserting that the Division has no jurisdiction to adjudicate contract disputes between parties, regardless of whether hidden discounts exist, the Division has deleted the phrase *indicating a contracted discount rate with the provider and has provided* and added the words *based on* between the words *denied payment* and *a contract*. In the same subsection, the phrase *in accordance with Insurance Code Chapter 1305* has been added after the words *workers' compensation health care network* to clarify that workers' compensation networks must be certified under Insurance Code Chapter 1305. In response to comments that the language in subsection (d) was too broad and would require the redaction of contact information for persons who may have relevant information relating to the dispute, the Division has revised the language by deleting the word *confidential* between the word *contains* and the word *information*, deleting the phrase *or a party in the dispute*, and substituting the word *patient* for the word *person* and the words *that patient* for the words *the person* to appropriately narrow the scope of the subsection. In response to several comments that question the constitutionality of the removal by HB 7 of the SOAH from the MDR appeal process, the Division has added a severability clause in new subsection (e), which provides that if a court of competent jurisdiction holds that any provision of §§133.305, 133.307, and 133.308 is inconsistent with any of the statutes of the state, are declared unconstitutional, or are invalid for any reason, the remaining sections would still be effective. The constitutionality of Labor Code §413.031(k), from which the statutory basis of these rules is derived, is currently being litigated. If a court of competent jurisdiction were to declare Labor Code §413.031(k) and provisions of these rules that implement §413.031(k) unconstitutional, then the provisions unaffected by a court's decision would be valid.

§133.307. In proposed subsection (a), the Division has revised the effective date from September 1, 2006 to January 15, 2007, to give both the Division and stakeholders adequate time to prepare for the changes in procedure to the MDR rules and process. In response to comments that subsection (c)(1) was confusing and a comment that the timeframe to request a refund notice of 20 days, as proposed, was not long enough, the Division has revised the timeframe for filing a refund notice from 20 days, as proposed, to 60 days and has revised the subsection for further clarification. In subsection (c)(2)(D), in response to a comment that if a carrier denies payment on the basis of compensability, then other threshold issues may not be addressed and it may be necessary for the carrier to enter additional reasons into the record as part of the MDR process, the Division has added the word *liability* after the words *extent of injury* and before the words *and/or medical necessity*. In subsection (c)(2)(E), the Division agreed to clarify and added the word *applicable* before the words *medical records* in response to a comment requesting that the Division explain that only those medical records in possession of the health care provider are required. In response to a comment to clarify when an employee may need to request MDR, subsection (c)(3) has been changed to clarify that an injured employee may request MDR when a carrier or a health care provider denies the injured employee's refund or reimbursement request. In subsection (c)(4), in response to a comment that along with the request, the Division will provide a copy of all documentation submitted in support of the request, the Division has added the phrase *and the documentation submitted in accordance with paragraphs (2) and (3) of this subsection after the words the request and before the words to the respondent*. In subsection (d), the words *to request* have been changed to *to a request for*, for clarification and readability. In subsection (d)(1), the word *calendar* has been added in two instances to clarify that *14 days* means *14 calendar days* in response to comments requesting clarification of the time frame. In subsection (d)(2)(A)(iii), the Division has added the words *not already provided by the requestor* after the words *the fee dispute*, in response to comments that the subsection be modified to require that the responding party only include medical records or documents provided by the requestor in the original request because there is no reason to make both parties file identical records and documentation. The Division revised subsection (d)(2)(B) by deleting the sentence that states "[r]esponses shall not address new or additional denial reasons or defenses after the filing of a request," and adding the sentence that states "[i]f the response includes unresolved issues of compensability, extent of injury, liability, or medical necessity, the request for MDR will be dismissed in accordance with subsection (e)(3)(G) and (H) of this section." These changes will allow a carrier to submit a subsequent response when a final decision is rendered regarding threshold issues such as compensability, extent of injury, liability, and medical necessity, in response to several comments that the language be changed to allow a carrier to provide additional evidence to support the reason for reduction or denial of payment. In subsection (d)(2)(C), a commenter requested that the language be revised to require the carrier to submit a written statement that the carrier did not receive information relevant to the dispute prior to the MDR request and to clarify whether an affidavit or written statement is required. In response to this comment, the Division has revised subparagraph (C) by deleting the words *so certify when the carrier files the request form with* and substituting the words *include that information in a written statement in the response the carrier submits to* to allow the carrier to submit a written statement indicating the carrier has not received the information prior to the MDR request. In subsection (d)(2)(D), the Division added the words *medical fee* before *dispute* and the words *or liability* have been added after the words *extent of injury* and the words *has not been resolved and* and *11 (PLN 11)* have been deleted for clarification. Also, the Division has added subsection (d)(2)(E), which states "[i]f the medical fee dispute involves medical necessity issues, the carrier shall attach a copy of docu-

mentation that supports an adverse determination in accordance with §19.2005...." This change clarifies that MDR intake requires sufficient documentation, which meets the definition of *adverse determination*, to determine that an issue of medical necessity exists and dismiss the request for resolution of medical fee dispute. In subsection (e)(1), the Division has added the sentence that states "[t]he Division shall forward any additional information received by the parties," for clarification. The Division has deleted subsection (e)(2) and moved rule language to adopted subsection (e)(3)(H) based upon a comment that requested the dismissal of medical fee disputes involving compensability, extent of injury, or liability, instead of providing for the abatement of medical fee disputes, to avoid a pending status and allow the opportunity to refile and start the fee dispute process. This is also consistent with the dismissals of medical fee disputes involving medical necessity issues. The Division renumbered subsection (e)(3) ((e)(2) as adopted), (e)(4) ((e)(3) as adopted), (e)(5) ((e)(4) as adopted), and (e)(6) ((e)(5) as adopted), accordingly. In subsection (e)(4)(F) ((e)(3)(F) as adopted) the language *pursuant to a private contractual fee arrangement* has been substituted for the words *to an employee by a network provider subject to Insurance Code Chapter 1305*; or for consistency with the change to §133.305(c)(4) made in response to a comment that the Division has no jurisdiction to adjudicate contract disputes between private parties. In subsection (e)(3)(G), the word *if* has been deleted as unnecessary and for consistency with the other subparagraphs and the words *adverse determination of* have been added before the words *medical necessity* for clarification. In subsection (e)(3)(H), the Division has deleted proposed language that indicated the Division may dismiss a request for MDR involving contract rates not pertaining to networks certified under Insurance Code Chapter 1305 because the provision would be duplicative of adopted subsection (e)(3)(F). Adopted subsection (e)(3)(H) incorporates the provision of deleted proposed subsection (e)(2) and provides for the dismissal of medical fee disputes involving related disputes pertaining to compensability, extent of injury, or liability for the claim, which have not been resolved. In subsection (e)(5) ((e)(4) as adopted), the words *and to representatives of record for the parties* have been added in response to a few commenters who requested that the Division send the fee dispute decision to the parties' representatives, as well as to the parties to the dispute. In subsection (f), the Division has added the sentence that states "[t]he Division and the Department are not considered to be parties to the medical dispute pursuant to Labor Code §413.031(k)," in response to comments that the proposed rule does not provide for an evidentiary hearing and to clarify the statutory provision.

§133.308. In proposed subsection (a), the Division has revised the effective date from September 1, 2006 to January 15, 2007, to give both the Division and stakeholders adequate time to prepare for the changes in procedure to the MDR rules and process. Also in subsection (a), in response to a few comments that §133.309 is subject to pending litigation and may be rendered invalid, the Division revised the reference from §133.309 to Labor Code §413.031(n) and related rules. The Division has rewritten subsection (e) for clarification and for consistency with other sections that distinguish network versus non-network disputes, as well as in response to a commenter who questioned why the proposed subsection, (e)(3) specifically, excluded non-network employees from medical necessity disputes. The revised subsection states who may be considered requestors in network disputes in subsection (e)(1): in subparagraph (A), providers, or qualified pharmacy processing agents acting on behalf of a pharmacy, for preauthorization, concurrent, and retrospective medical necessity dispute resolution; and in subparagraph (B), employees for preauthorization, concurrent, and retrospective medical necessity dispute resolution. The revised subsection states who may be considered requestors in non-network disputes in subsection (e)(2): in subparagraph (A), providers, or qualified pharmacy processing agents acting on behalf of a pharmacy, for preauthorization, concurrent, and retrospective medical necessity dispute resolution; and in subparagraph (B), employees for preauthorization and concurrent medical necessity dispute resolution; and for retrospective medical necessity dispute resolution when reimbursement was denied for health care paid by the employee. In response to a comment regarding the 45-day timeframe, the Division has revised the text of subsection (g) by inserting the word *calendar* after *45th* and before *day* and inserting the words *receipt of* after the words *day after* and before the words *the denial of reconsideration* to address the commenter's concern. Also in subsection (g), the Division has deleted the reference to *Insurance Code Article 21.58A*, and has inserted the phrase *§133.305 of this subchapter*, to reference the definition of *life-threatening* that the Division added in §133.305(a)(2). In response to a comment that subsection (h)(3) be revised to state that a requestor does not have to seek reconsideration of a determination on a life-threatening condition prior to seeking an IRO determination, the Division has revised the paragraph by adding the words *involving a life-threatening condition* between the words *dispute* and *has not been submitted*. In subsection (k)(1), in response to a comment that the paragraph be revised to indicate what constitutes a provider as a party to the dispute, the Division has added the words *or providers with relevant records* between the words *the party* and *shall deliver*. In subsection (n), the words *and to representatives of record for the parties* were added between the words *the parties* and *and transmitted* for clarification of to whom the IRO decision will be mailed or transmitted. In subsection (n), the Division has also revised the language by deleting the words *by facsimile to* and adding the words *in the form and manner prescribed by* between the words *transmitted* and *the Department* to provide the Department with the flexibility to adapt new technology, such as, for example, email transmission of decisions, in order to improve the efficiency of the IRO process. In response to several comments requesting that subsection (o) be revised to allow a carrier to use a peer review report for subsequent denials of the same claim, the Division has added the words *health care services subsequently reviewed for that compensable injury* after the words *denials of the same* and deleted the word *claim* to provide clarification and appropriately narrow the scope of the subsection. Also in response to the same comments, the Division has revised the catchline of the subsection by adding the words *Peer Review Report after an*, between the words *Carrier Use of* and *IRO Decision*, to reflect the changes made to the text. In subsection (p)(8), the title *(relating to MDR - General)* was deleted and the words *of this subchapter* were inserted to conform to *Texas Register* format. In subsection (r)(2), the Division inserted the word *including* after the words *making the decision*, in response to a comment that the appellate record should include all documents submitted to the IRO by either party and all documents reviewed by the IRO during the dispute to clarify that subsection (r)(2)(A) - (J) do not enumerate all the items that could be included in the record. In subsection (t), the language *(relating to MDR--General and MDR of Fee Disputes)* was deleted and the words *(relating to MDR of Fee Disputes)* were inserted to correct the reference.

Section 133.305 outlines the general requirements of the MDR process. The section defines terms relevant to MDR, including *network health care* and *non-network health care*. The section uses *preauthorization or concurrent* for consistency with the use of those terms in Insurance Code Article 21.58A and related rules. The section sets forth the dispute sequence for resolving medical dispute issues, and requires all issues of compensability, extent of injury, liability and medical necessity to be resolved before a medical fee dispute can be processed. The section also establishes circumstances in which the Division may assess administrative fees, sets out requirements for redacting confidential information, and provides for the severability of any clauses a court may strike down so that the remaining provisions are still effective.

Section 133.307 establishes the new MDR process for resolving disputes regarding the amount of payment due for health care determined to be medically necessary and appropriate for treatment of a compensable injury. This section applies to certain authorized out-of-network care not subject to a fee contract, as well as to non-network health care. The section specifies who can be a requestor, the manner in which requests must be made, and the time requirements that govern requests. The request for medical fee dispute resolution shall be filed not later than one year after the date of service in dispute, unless issues of compensability, extent of injury, liability and medical necessity exist. Section 133.307 allows a requestor access to MDR to resolve a fee dispute for which issues of compensability, extent of injury, liability and/or medical necessity have been finally determined through dispute resolution regardless of the date of service, if the submission of the request for MDR is within 60 days of the final determination.

Section 133.307 outlines the following three steps for resolving fee disputes. First, the requestor is required to present all information necessary to resolve the dispute upon the initial request for dispute resolution. The Division will notify the respondent of the dispute by providing a copy of all the information submitted by the requestor. Second, in response to the dispute, the section requires the respondent, most often the carrier, to provide all information required by this section, including any missing explanation of benefits that may identify outstanding compensability, extent of injury, liability, medical necessity, or fee issues. If compensability, extent of injury, liability and/or medical necessity issues are identified, the fee dispute request will be dismissed until the issue is resolved. Third, the section provides that the Division may request additional information from the disputing parties and may raise new issues in the MDR process. The section also sets forth the reasons that justify dismissing a request for dispute resolution.

The section provides that aggrieved parties who disagree with the decision may seek judicial review of the decision by filing a petition in a Travis County district court. The section outlines the appropriate appeals process for parties to MDR seeking judicial review, the process for preparing a record for appeal of an MDR decision, and the contents of the record. The section also explains the Division's assessment of expenses for preparing the record.

Section 133.308 provides the process for the review of network and non-network preauthorization, concurrent or retrospective medical necessity disputes. The section specifies who can be a requestor, the manner in which requests must be made, and the time requirements that govern requests. The section also states the process for IRO assignment and carrier document submission. The section establishes IRO fees and corresponding time limits for payment along with the consequences of case dismissal in the event of non-compliance with the section. Further, the section addresses the process for an IRO to request a designated doctor exam. The time frames for IRO decisions are set forth, as well as the required contents of the IRO decision. The section provides that the IRO is responsible for determining the prevailing party and compiling the appellate record in the case of judicial review. The process of appealing IRO decisions is outlined in the section. IRO decisions are not agency decisions, and the Department and the Division are not parties to any such appeals. Both network and non-network appeals processes are detailed, as well as those for appeals of non-network spinal surgery. The section also addresses who will pay the costs for the appeal.

General: A commenter approves of the proposed rules, appreciates the opportunity to provide feedback regarding medical billing disputes, and thanks the Division for soliciting input from stakeholders prior to proposing the rules.

Agency Response: The Division appreciates the commenter's support.

General: A commenter states that the Texas Legislature passed HB 2600 and HB 7, in large part, because the size and the diversity of the state make access to pharmacy care a serious concern, particularly in rural areas of the state.

Agency Response: The Division understands the commenter's concerns about access to pharmacy care and has incorporated references to pharmacy processing agents in the sections.

General: A commenter does not recognize any language in the proposed rules that addresses the merger of the IRO processes of the Department and the Division. The commenter asks several related questions including: (1) whether IRO requests of the Department will be processed as pre-HB 7 reviews; (2) whether the Heath and Workers' Compensation Network and Quality Assurance Division will include the Department's request for the IRO; and (3) whether IROs now come under the Division of Workers' Compensation.

Agency Response: The effective date for the transition of Division IRO processes to the Department is anticipated to be January 15, 2007, which is specified in §133.307(a) and §133.308(a). IRO assignments previously handled by the Division will transfer to the Health and Workers' Compensation Health Care Network and Quality Assurance Division at that time. The Division provides clarification by adding a definition for the term *adverse determination* to §133.305(a), which is consistent with the Department's utilization review agent rules and also provides consistency within the MDR process.

General: A commenter states that to facilitate a quality IRO review, the requesting forms need to be completely and accurately completed because failure to do so may result in a high level of incomplete and inaccurate data, which could have a deleterious effect on the quality of the resultant review.

Agency Response: The Division expects that parties requesting independent review will make a good faith effort to complete all of the necessary information. Additionally, the online submission form is programmed with required fields that must be completed in order to be submitted.

General: A commenter respectfully requests that the rule be amended to provide for one of two options: (1) an administrative hearing presided over by State Office of Administrative Hear-

ings (SOAH) administrative law judges who specialize in hearings held to resolve medical necessity and payment disputes; or (2) an administrative hearing presided over by Division hearing officers who specialize in hearings held to resolve all medical disputes (medical necessity and payment disputes). The commenter is concerned that the MDR process lacks an administrative hearing and an opportunity for the disputing parties to build a record that includes the presentation of evidence and witnesses, as well as the cross-examination of witnesses presented by health care providers and injured employees. Members of the commenter's association are concerned about the lack of an agency record for appeals of IRO and Division medical fee dispute decisions to district court. Another commenter requests that dispute resolution be conducted under the provisions of the Administrative Procedure Act so that the decisions of the Division will not be based solely on unverified documents filed by parties to the dispute. According to the commenter, failure of the agency to conduct the review and hearing of the request in the manner described in these provisions would result in a violation of the division's statutory duty and a denial of fundamental due process guaranteed to the commenter by the Texas Constitution and the U.S. Constitution. Another commenter states that the opportunity for a hearing before a SOAH administrative law judge has been lost now for almost a year and thinks that everybody that participates in the system has now recognized that this is not good for the system.

Agency Response: The Division disagrees with the commenter that it has the statutory authority to make the requested change. HB 7, §8.013(b) states that "[e]ffective September 1, 2005, the State Office of Administrative hearings may not accept for hearing a medical dispute that remains unresolved pursuant to Section 413.031, Labor Code. A medical dispute that is not pending for a hearing by the State Office of Administrative Hearings on or before August 31, 2005, is subject to subsection (k), Section 413.031, Labor Code, as amended by this Act, and is not subject to a hearing before the State Office of Administrative Hearings." Labor Code §413.031(k) does not provide the Division with the authority to create a system for administrative appeals of medical disputes prior to judicial review. Labor Code §401.021 and §408.027(e) do not require hearings for medical fee disputes. Labor Code §401.021 provides that only certain specified provisions of the Texas Administrative Procedures Act are applicable to "a proceeding" under the Texas Workers' Compensation Act due to the language of the statute "except as otherwise provided by . . . [that Act]" and HB 7 specifically removed the language in §413.031 both for an entitlement to a hearing and for a contested case hearing at the SOAH for medical fee and necessity disputes. Labor Code §408.027(e) does not apply because a hearing should not be implied in §413.031 when the entitlement to a hearing has been specifically deleted and because the more recent and specific provisions of HB 7 are properly regarded as an exception to the earlier and more general language. The Division disagrees that the MDR process lacks an opportunity for disputing parties to build a record because §133.307(f) and §133.308(r) provide each party to a dispute with a meaningful opportunity to be heard in an informal adjudication or informal decision making process, prior to any court's review of the dispute. A party may provide documentation and explanation to support its position and to dispute or reject the position and information provided by another party to the dispute. Each decision contains a listing of the information submitted by each party and the rationale and basis for the decision. The Division and its predecessor agency have utilized informal adjudications to finally resolve numerous medical disputes for many years. Finally, the rule provides that a certified copy of the record of the dispute, all relevant documentation submitted for MDR, and the decision will be made available for any judicial review. Texas courts have affirmed that certain informal adjudications satisfy constitutional due process requirements. See, for example, *Bell v. Tex. Workers' Comp. Comm'n,* 102 S.W.3d 29, 303-306 (Tex. App.-Austin, 2003, no pet). Recent federal appellate court decisions have expanded the constitutional use of informal adjudications involving largely policy decisions and legislative facts. They have upheld the use of substantial evidence review for informal adjudications and have set strict requirements before additional due process, such as a formal evidentiary hearing, is required. See, for example, *Continental Air Lines, Inc. v. Dole*, 784 F.2d 1245 (5th Cir. 1986); *National Tower, LLC v. Plainville Zoning Bd. Of Appeals*, 297 F.3d 14, 20-21 (1st Cir. 2002); and *Cascade Natural Gas. Corp. v. Fed. Energy Reg. Comm'n*, 955 F.2d 1412, 1425-26 (10th Cir. 1992). Judicial review is available after the informal adjudication occurs and, also, provides constitutional due process. *Lujan v. G&G Fire Sprinklers, Inc.,* 532 U.S. 189, 197 (2001). In this manner, the procedural processes provided in these rules conform to the constitutional due process requirements.

General: A commenter recommends the Division require, within the rules, a written explanation of any denials or reductions in payment for each line item on the explanation of benefits (EOB) because physicians will not understand the exception codes which are not mentioned in this rule and which have increased in number and all the different meanings associated with these codes may cause unnecessary disputes.

Agency Response: The Division disagrees with the commenter that it is necessary to amend the rules. Labor Code §408.027(e) requires that an insurance carrier send to the Division, the health care provider, and the injured employee a report that sufficiently explains the reasons for the reduction or denial of payment for health care services provided to the employee.

General: A commenter recommends a time limit be placed on a carrier to request a refund based upon the rational that carriers have in years past requested refunds from physicians years after the services were provided.

Agency Response: The Division disagrees that these rules need to establish a timeframe to request refunds as §133.260 establishes the process and timeframes for carriers to request refunds. Labor Code §408.0271(a) provides that if the health care services provided to an injured employee are determined by the carrier to be inappropriate, then the carrier shall: (1) notify the health care provider in writing of the carrier's decision; and (2) demand a refund by the provider of the portion of payment on the claim that was received by the health care provider for the inappropriate services.

§133.305(a): A commenter states that instead of referencing the definition of *life-threatening condition* listed in Insurance Code Article 21.58A, a definition for the term should be included in the definitions section of the adopted rule because many providers do not have copies of the Insurance Code available to reference.

Agency Response: The Division agrees with the commenter and has added a definition of *life-threatening* in subsection (a)(2), as adopted, consistent with the definition contained in Insurance Code Article 21.58A. In conjunction with this change, the Division has also corrected the reference in §133.308(g) by deleting the words *Insurance Code Article 21.58A* and adding the words *§133.305 of this subchapter*.

§133.305(a)(2)(A): A commenter supports specific references to Labor Code §413.0111, which authorizes pharmacies to use agents to process claims, under proposed §133.305 and §133.307 as legitimate requestors and parties to disputes involving reimbursement of pharmacy related medical bills. Another commenter further states this provision is not sufficient in assisting injured employees in obtaining their medications or in assisting pharmacy agents' ability to collect reimbursement.

Agency Response: Labor Code §413.0111 allows pharmacy processing agents who demonstrate that they are authorized by a pharmacy to act on its behalf, to participate in the MDR process. This expands access to the MDR process to pharmacy processing agents granting participation that was not previously available to them. The definition of *medical fee dispute* in proposed subsection (a)(2)(A) ((a)(4)(A) as adopted) includes a qualified pharmacy processing agent's dispute of a carrier's reduction or denial of a bill as a type of dispute, as intended by Labor Code §402.021(a)(2) and allowed by Labor Code §413.031. However, subsection (a)(2)(A) ((a)(4)(A) as adopted) has been changed to clarify that a pharmacy processing agent is not considered to be a health care provider.

§133.305(a)(2)(A): A commenter requests clarification on what entities are considered to be *qualified pharmacy agents.*

Agency Response: The Division clarifies that in subsection (a)(2)(A) ((a)(4)(A) as adopted) a qualified pharmacy agent is an agent or assignee of a pharmacy authorized to process claims and act on behalf of the pharmacy under terms and conditions agreed on by the pharmacy. Section 133.307, as adopted, requires documentation to be provided to MDR demonstrating the relationship between the pharmacy and the pharmacy processing agent, the dates of service covered by the contract, and a clear assignment by the pharmacy of the right to participate in the MDR process.

§133.305(a)(2)(A): A commenter states that Labor Code §413.0111 does not confer health care provider status on pharmacy processing agents. Rather, that section authorizes pharmacies to use agents or assignees to process claims and act on behalf of pharmacies only under the terms and conditions agreed upon by the pharmacies. The commenter suggested that subsection (a)(2)(A) may unintentionally create the opportunity for abuse and confusion and exceeds the Division's authority by improperly granting independent rights and status to processing agents.

Agency Response: The Division disagrees that subsection (a)(2)(A) ((a)(4)(A) as adopted) improperly grants rights or status to pharmacy processing agents. Labor Code §413.0111, allows for *pharmacies to use agents or assignees to process claims and act on the behalf of the pharmacies under terms and conditions agreed on by the pharmacies.* Subsection (a)(2)(A) ((a)(4)(A) as adopted) specifically includes a *qualified pharmacy processing agent* as one who can bring a dispute of an insurance carrier reduction or denial of a medical bill. To be qualified, the agent must clearly demonstrate that the pharmacy has assigned its right to participate in the MDR process on its behalf. This rule does not expand or grant rights or status to the pharmacy processing agent. Subsection (a)(2)(A) ((a)(4)(A) as adopted) has been changed to clarify that a pharmacy processing agent is not considered a health care provider.

§133.305(a)(5): A commenter requests clarification regarding preauthorization disputes. The commenter states that the proposed rules seem to require preauthorization of pharmacy services in contradiction to Labor Code §413.0141, relating to the seven-day initial pharmacy coverage and carrier eligibility for reimbursement.

Agency Response: The Division disagrees that subsection (a)(5) ((a)(7) as adopted) changes the requirements for the preauthorization of pharmacy services. This subsection merely defines preauthorization and concurrent medical necessity disputes as a type of dispute that can be brought to MDR. Treatments and services that require preauthorization are listed in Labor Code §413.014 and 28 TAC §134.600 relating to Preauthorization, Concurrent Review, and Certification of Health Care. In accordance with Labor Code §413.0141 and 28 TAC §134.501, pharmaceutical services provided within the initial seven days following the date of injury do not require preauthorization and if payment is denied by the carrier on such services, MDR may be requested by the provider under subsection (a).

§133.305(a)(2)(C): Several commenters state that the wording of subsection (a)(2)(C) ((a)(4)(C) as adopted) could be interpreted to allow medical disputes seeking refund orders only after a Division audit or a Division review. These commenters recommend that this subsection be amended to clarify that an insurance carrier may also request a health care provider refund after a carrier audit or review pursuant to Labor Code §408.0271. One commenter suggested adding the phrase *retrospective review of a paid bill by the carrier in which a refund is requested* to the types of disputes that can be brought as a medical fee dispute.

Agency Response: The Division agrees that this subsection should be clarified and has revised subsection (a)(2)(C) ((a)(4)(C) as adopted) to include a dispute resulting from a carrier audit or review by adding the words *or carrier* after the word *Division* and before the word *audit*.

§133.305(a)(3): Commenter states the definition of *network care* conflicts with 28 TAC §§10.102(i), 10.103(a)(4)(B)(iv), and 10.104(a)(2) and confuses the distinction between network and out-of-network care.

Agency Response: The Division disagrees that the definition of *network care* conflicts with Texas Department of Insurance rules. Insurance Code §1305.006 and 28 TAC §10.61 provide that an insurance carrier that establishes a network or contracts with a network is liable for out-of-network care in certain circumstances. 28 TAC §10.2(a)(18) defines *network* as an organization that provides or arranges to provide health care services to injured employees. Out-of-network health care is different from non-network health care. For clarification, subsections (a)(3) and (4) ((a)(5) and (6) as adopted) have been revised by adding the words *or arranged* between the words *delivered* and *by a certified workers' compensation network*. In addition, the Division revised subsection (a)(5) to clarify that network care includes authorized out-of-network care.

§133.305(b): A commenter requested clarification of §133.307 regarding the processing of medical necessity and compensability related disputes prior to resolution of fee disputes.

Agency Response: The Division revised subsection (b) for consistency with various changes to §133.307.

§133.305(c): A commenter expressed concern that the language of subsection (c) does not recognize that good faith disagreements and disputes can and will occur and recommends the section be deleted. If not deleted, the commenter

suggests including language that a lack of good faith in the action of the carrier or provider be present before imposing administrative fees.

Agency Response: The Division disagrees with the recommendation. Labor Code §413.020 requires the Division to establish, by rule, procedures to charge insurance carriers a reasonable fee for access to or evaluation of health care treatment fees or charges. In addition, this statute requires procedures to charge insurance carriers who unreasonably dispute charges that are consistent with Division rules. The dispute resolution process is costly to the system and therefore the Division has included provisions to discourage actions that result in unnecessary or avoidable disputes. The language in this rule makes the assessment of the fee discretionary and the Division may consider the facts presented by the parties related to the dispute.

§133.305(c)(3) and (4): A commenter asked how health care providers can obtain a copy of a contract from the carrier to determine if a workers' compensation discount is warranted. The commenter states that there are situations where third parties processing claims for carriers have contracts for discounted rates that they inappropriately apply to workers' compensation claims and the health care provider has no knowledge of the contract.

Agency Response: The Division is not authorized to adjudicate a medical fee dispute pertaining to a contractual, private fee arrangement. If a carrier contends that contractual terms apply to a medical service rather than Division rules, the carrier will be required to produce a copy of the agreement. If a contract is produced, it can be provided to the health care provider. However, if a fee contract cannot be verified by either party, the Division may issue a MDR decision based on Division rules.

§133.305(c)(4): The commenters recommend that proposed subsection (c)(4) be deleted. The commenters state the subsection is in conflict with Texas Labor Code §§413.011(d), 413.016(b), and 415.005(a). Section 1305.153 of the Insurance Code only applies to reimbursement of network providers and does not prohibit the application of PPO discounts or processes in non-network contracts. Insurers and providers may contract for negotiated fees that are below Division fee guidelines regardless of whether the medical care is rendered through a certified health care network or not. The commenters state that there is no requirement in the law that such discount fee arrangements be negotiated or brokered by a certified health care network. Another commenter questions whether this provision indicates that negotiated discounts are only allowed through networks.

Agency Response: The Division disagrees with the recommendation to delete subsection (c)(4). Labor Code §413.011(d) allows an insurance carrier to pay fees to a health care provider that are inconsistent with Division fee guidelines if the insurance carrier has a contract with the health care provider and the contract includes a specific fee schedule. Such contracts are not limited to certified networks. Subsection (c)(4) describes the situation where the contract provided to MDR as the basis of a reduction or denial of payment indicates that the arrangement between the insurance carrier and the health care provider is one that requires network certification. In this situation, the Division may assess a fee for MDR. Subsection (c)(4) has been changed to provide additional clarity.

§133.305(c): A commenter expressed concern that the language of subsection (c) does not recognize that good faith disagreements and disputes can and will occur and recommends the section be deleted. If not deleted, commenter suggests including language that a lack of good faith in the action of the carrier or provider be present before imposing administrative fees.

Agency Response: The Division disagrees with the recommendation. Labor Code §413.020 requires the Division to by rule establish procedures to charge insurance carriers a reasonable fee for access to or evaluation of health care treatment fees or charges. In addition, this statute requires procedures to charge insurance carriers who unreasonably dispute charges that are consistent with Division rules. The dispute resolution process is costly to the system and therefore the Division has included provisions to discourage actions that result in unnecessary or avoidable disputes. The language in this rule makes the assessment of the fee discretionary and the Division may consider the facts presented by the parties related to the dispute.

§133.305(d): A few commenters express concern that the language in this subsection is too broad and requires the redaction of contact information for persons who may have relevant information relating to the dispute. One commenter states that the subsection as proposed would require, for example, the redaction of all information identifying employers, other health care providers and other persons involved in the dispute or the injured worker's claim when many of these persons could have relevant information relating to the dispute and should be identified. Another commenter objects to the language *any information that identifies the person* and requests that the words *the name and other personally identifiable information of any other claimant* be substituted to avoid the redaction of contact information for parties to the dispute well beyond a reasonable scope.

Agency Response: The Division agrees that the language should be clarified but disagrees that redaction should be limited to claimants in the workers' compensation system. Many times information is submitted in MDR that does not relate to a workers' compensation claim, but contains medical information on a named patient. The intent of this provision is to require the party offering such confidential health information to redact all identifying information from the documents before they are submitted to MDR. Subsection (d) has been revised to clarify that documentation containing health information related to a person other than the claimant involved in the dispute must be redacted to remove any information that could identify the person by deleting the word *confidential* between the word *contains* and the word *information*, deleting the phrase *or a party in the dispute*, and substituting the word *patient* for the word *person* in two places.

§133.307(a)(3): A commenter recommends the phrase *authorized out-of-network healthcare* be defined in §133.305 as this term is used in §133.307.

Agency Response: The Division agrees and has revised §133.305(a)(3) ((a)(5) as adopted) to clarify that *authorized out-of-network* care is a component of network health care. Subsection (a)(3) ((a)(5) as adopted), references Insurance Code Chapter 1305, which establishes workers' compensation networks, including authorized out-of-network care as provided in §1305.006, relating to Insurance Carrier Liability for Out-of-Network Health Care.

§133.307(b): A commenter questions why carriers are not allowed to request MDR for fees in this section when, under §133.260, health care providers are allowed to request MDR if a carrier seeks a refund from a health care provider. The

commenter states that the rules do not provide a method for the carrier to pursue overpayment. The commenter questions why a health care provider is required to provide responses in §133.307(d) and (d)(3), if the carrier cannot request MDR and believes it would not be an onerous burden to add *carrier* to §133.307(b).

Agency Response: The Division declines to revise §133.307(b) because §133.260 establishes a process for the carrier to request and receive a refund for overpayment. The health care provider is required to send the carrier the refund and submit an MDR request if the health care provider disagrees with the refund request. This process eliminates the need for the carrier to pursue MDR for a refund request. Labor Code §408.0271, (regarding Reimbursement by Health Care Provider) states that the health care provider commits an administrative violation if the provider does not submit the refund to the carrier. If a provider fails to provide the requested refund, then the provider may be fined by the Division's Legal and Compliance area.

§133.307(b)(1): A commenter supports specific references to pharmacy processing agents in accordance with §413.0111 under proposed §133.305 and §133.307. The commenter supports references in the rule to Labor Code §413.0111 because this statute authorizes pharmacies to use pharmacy processing agents and other assignees in reimbursements claim processing.

Agency Response: The Division appreciates commenter's support and acknowledges the legislative intent of §413.0111 and HB 7. Accordingly, the rules provide specific references to pharmacy processing agents.

§133.307(b)(1): A commenter states that Labor Code §413.0111 does not provide health care provider status to pharmacy processing agents and feels that §133.307(b)(1) creates confusion. The commenter believes this proposed rule language exceeds the Division authority and creates improper rights and status to pharmacy processing agents, which may not exist in the pharmacy and pharmacy processing agent contract.

Agency Response: The Division agrees to clarify this subsection to avoid unnecessary confusion and revised §133.307(b)(1) to allow health care providers or qualified pharmacy processing agents to request MDR for fee disputes. Labor Code §413.0111 is clear; the Commissioner must authorize pharmacies to use agents or assignees to process claims, and act on the behalf of pharmacies under terms and conditions agreed on by pharmacies. Thus, if a pharmacy chooses to utilize a pharmacy processing agent, the pharmacy processing agent may request MDR.

§133.307(b)(2): A commenter seeks clarification of subsection (b)(2) in order to know what is meant by *review*. The commenter wants to know whether a *review* pursuant to subsection (b)(2) includes carrier audits, which result in a refund request. Another commenter seeks clarification concerning whether subsection (b)(2) includes carrier audits and wants to know if the carrier, after paying a health care provider, can later claim that the carrier overpaid. A commenter recommends subsection (b)(2) be amended to clarify that an insurance carrier may also request a health care provider refund after a carrier audit pursuant to Labor Code §408.0271.

Agency Response: The Division clarifies that subsection (b) allows disputes regarding refunds requested by the carrier to be processed through MDR. However, to provide greater rule clarification subsection (b)(2) has been changed by adding the words *or carrier* between the words *the results of a Division* and *audit or review*. The commenter is further advised that a carrier may seek a refund of overpayment in accordance with 28 TAC §133.260. The language of §133.305(a)(4)(C) has also been changed and the phrase *or carrier* is added to provide consistency in the rules. A carrier may seek a refund of overpayment in accordance with §133.260.

§133.307(c)(1): A commenter states that requiring a pharmacy or pharmacy processing agent to go through the different workers' compensation systems (such as those for medical necessity, compensability, extent of injury, liability) with different timeframes just to get a $10 or $12 prescription paid is a mechanism that does not work for delivery of pharmacy if this system is about the injured workers. The commenter believes it is more expensive to go through the MDR process than a $10 or $12 prescription.

Agency Response: The Division believes that HB 7 made progress towards some of these issues as pharmacy processing agents are now provided access to MDR in accordance with Labor Code §413.031. The Division understands the comment but disputes regarding fees cannot be adequately addressed or resolved until threshold issues such as compensability, extent of injury, liability, or medical necessity are determined.

§133.307(c)(1)(A) and (B): A commenter seeks clarification of the subsection (c)(1) *timelines* for filing disputes. The commenter believes that providers will be confused by this rule because most health care providers do not have rule books and merely file a bill and then are angry when the bill is not paid. The rule is also confusing to employees and should be laid out in plain language terms for employees who do not have attorneys to explain the rule to them. The commenter interprets the rule to mean that requestors have one year to request MDR, but if there is a medical necessity or other issue and a final determination is reached prior to the one year deadline, it is possible that a party would have less than one year to request MDR. A commenter recommends the subsection be amended to clarify that the exceptions to the MDR timeline listed may be filed after the one year deadline. Another commenter questions whether the 60-day timeline applies when a medical necessity dispute or compensability/extent of injury dispute is resolved before one year from the date of service.

Agency Response: The Division agrees that subsection (c)(1) should be revised for clarification. A requestor has one year from the date of service in dispute to request MDR. However, if issues of medical necessity, compensability, extent of injury, or liability are pending, a decision must be reached on these issues before MDR can properly address fee disputes in accordance with §413.031(c). Therefore, an individual seeking MDR, that also has pending threshold issues, will have either one year, or 60 days after a final decision is received on the threshold issues, whichever affords the individual the most time to request MDR.

§133.307(c)(1)(A): A commenter recommends clarification in §133.307(c)(1)(A) by adding the term *Division* before decision, which would be consistent with subsection (e)(2).

Agency Response: The Division disagrees with the commenter's recommendation to add the term *Division* because a medical fee dispute cannot be sufficiently resolved until any threshold issues of compensability, extent of injury, liability, or medical necessity are determined. In accordance with Labor Code §410.251 a party that has exhausted its remedies under the Texas Workers' Compensation Act and is aggrieved by a final decision of the Division appeals panel may seek judicial review. Therefore, medical fee disputes cannot be resolved and will be dismissed until

a final decision is reached on those threshold issues. A party is given 60 days after a final decision is reached on these threshold issues to request MDR for fees. The Division has deleted subsection (e)(2) in response to other comments. Furthermore, Labor Code §413.031(c) provides guidance for resolving fee disputes for services determined to be medically necessary and appropriate for treatment of a compensable injury.

§133.307(c)(1)(A) and (B): A commenter questions whether all health care providers treating an injured employee will receive notice of disputes of compensability/extent of injury or medical necessity. The commenter states that health care providers currently do not receive such notices.

Agency Response: The Division appreciates that notice to a health care provider of disputed threshold issues, such as compensability, extent of injury, liability, and medical necessity, is necessary for a less burdensome system. Under Labor Code §408.027 a carrier must send to the Division, the health care provider, and the employee a report explaining reasons for reduction or denial of payment. 28 TAC §133.240(e) requires carriers to provide reasons for denial of payment in an explanation of benefits. 28 TAC §124.2 (regarding Carrier Reporting and Notification Requirements) does not require carriers to send notification regarding compensability/extent of injury disputes to all health care providers treating an injured employee. However, the Division is reviewing the issue regarding notice of compensability and extent of injury and is considering future revisions to 28 TAC §124.2 and other relevant rules.

§133.307(c)(1)(C): A commenter recommends subsection (c)(1)(C) be amended to clarify that an insurance carrier may also request a health care provider refund after an audit pursuant to Labor Code §408.0271.

Agency Response: The Division declines to make this change. Subsection (c)(1)(C) ((c)(1)(B)(iii) as adopted) pertains to provider refunds due to a Division audit or review. Carriers may request refunds from health care providers in accordance with 28 TAC §133.260.

§133.307(c)(1)(C): A commenter states the 20 day timeline to file a dispute after receipt of a refund notice is not sufficient for health care providers to conduct the necessary research related to a refund request. Instead, the commenter recommends a limited timeframe for the carrier to request a refund.

Agency Response: The Division agrees with the recommendation to extend the timeline to 60 days to file a dispute after receipt of a refund notice and revised subsection (c)(1)(C) ((c)(1)(B)(iii) as proposed) for consistency. The Division disagrees with the recommendation to add a timeframe limit for a carrier to request a refund; this is outside the scope of this rule because carrier refund requests are addressed by the Division in §133.260 and Labor Code §408.0271.

§133.307(c)(2)(E): A commenter recommends subsection (c)(2)(E) be amended to require copies of medical records only when applicable as pharmacy disputes do not typically involve medical records and pharmacists do not routinely have access to medical records for an injured worker. This provision could impose unnecessary time, copy, mail, and processing costs to the system.

Agency Response: The Division agrees with the clarification and revised subsection (c)(2)(E) to add the word *applicable* before the words *medical records*. The Division further clarifies that only those medical records in possession of the health care provider are applicable and required. For disputes relating to pharmaceutical services, the doctor's prescription would be required and may be the only medical record necessary.

§133.307(c)(1)(A) and (B): A commenter requests clarification of language in subsection (c)(1)(A) and (B) and recommends the language be amended to the more specific *medical fee dispute* rather than the general *dispute*.

Agency Response: The Division agrees with this recommendation and revised the rule to provide clarification by adding the word *fee* between the words *medical* and *dispute*. The Division has also similarly revised subsection (d)(2)(D) for language clarification and consistency with this change.

§133.307(c)(2)(G): A commenter states that HB 7 amended Labor Code §413.031(b) to allow a health care provider to submit a charge in excess of a fee guideline and is entitle the health care provider to review of medical service if reasonable medical justification exists for the deviation. A commenter is concerned that §133.307(c)(2)(G) prevents a health care provider from being reimbursed for more than the maximum allowable reimbursement (MAR), despite the fact that the higher amount is sometimes justified.

Agency Response: The Division disagrees that the subsection prevents a health care provider from being reimbursed for more than the justified maximum allowable reimbursement because this subsection pertains to treatment and services in which the Division has not established a maximum allowable reimbursement rate. The Division clarifies that maximum allowable reimbursement rates are governed by Labor Code §413.011, and related rules (generally 28 TAC §§134.202 - 134.506).

§133.307(c)(2)(H): A commenter supports the Division's recognition of proprietary contractual information between the pharmacy and its agents but has concerns about the routine disclosure of the assignment of rights for every MDR request. The commenter states this requirement is unwarranted, and results in unnecessary administrative costs, and converts private arrangements to public record. The commenter believes the proof of assignment should only be required only when both the provider and processing agent are asserting the right to reimbursement for the same pharmacy claim and the provider and the processing agent have been unable to resolve the assignment under the terms of their contract.

Agency Response: The Division appreciates commenter's support. However, the Division disagrees with the recommendation. Labor Code §413.0111 establishes that a pharmacy may use a pharmacy processing agent to process claims or act on behalf of the pharmacy. Documentation must be provided to demonstrate the relationship between the pharmacy and the pharmacy processing agent and establish that there is a clear assignment of the right to participate in the MDR process. The right to participate in the MDR process cannot be assumed because Labor Code §413.031 sets forth specific provisions for health care providers seeking review of medical services provided or for authorization of payment. The rule does not require disclosure of confidential contractual terms, only an agreement to verify the assignment of rights. A signed and dated copy of an agreement would meet the requirements of the rule.

§133.307(c)(3): A commenter questions whether an injured worker should look to the carrier for reimbursement when the injured worker paid a provider for health care services. The commenter states the carrier, not the injured employee, should

be required to ask the provider for a refund or go to MDR if necessary.

Agency Response: The Division declines to make this change in the rule because the process an injured employee must follow to request refunds is addressed by 28 TAC §133.270. Section 133.270 establishes that an injured employee may request reimbursement from the insurance carrier when the injured employee has paid for health care provided for a compensable injury. The carrier is required to reimburse the injured employee the Division fee guideline or contract amount. The injured employee may then seek reimbursement for any payment made above the Division fee guideline or contract amount from the health care provider who received the overpayment. In both these circumstances the injured employee may request MDR if the carrier or provider denies reimbursement. However, the Division revised §133.307(c)(3) and §133.305(a)(4)(B) to clarify that an employee may request dispute resolution of a reduction or denial of a refund request whether the reduction or denial is received from a carrier or a health care provider.

§133.307(c)(4): Two commenters recommend that the Division, or alternatively the requesting party, forward to the respondent a copy of the request and all documentation supporting the request which was submitted to the Division. In order to provide a complete response, the respondent should receive a copy of all information supporting the request not only a copy of the request.

Agency Response: The Division agrees that the respondent should receive a complete request and changed subsection (c)(4) for clarification of such. A complete request meets the criteria outlined in subsection (c)(2) and (3), which includes items beyond the request form such as medical bills and medical documentation.

§133.307(d): A commenter requests typographical corrections to this subsection.

Agency Response: The Division agrees with the recommendation and subsection (d) has been revised to reflect these typographical changes.

§133.307(d): A commenter questions why a health care provider would be a respondent in an MDR dispute if a carrier is not allowed to be a requestor.

Agency Response: The Division clarifies that a health care provider may be a respondent when an injured employee submits an MDR request for a refund from a health care provider.

§133.307(d)(1): A commenter recommends that subsection (d)(1) be amended to provide respondents at least 20 days to allow for extenuating circumstances and other reasons such as a health care providers office staff being out on vacation. Another commenter recommends that when a copy of a request for MDR is placed in the Division's carrier boxes the timeframe should begin when a carrier's representative signs a form acknowledging receipt of a request for MDR. Triggering the timeframe by placing the request for MDR in the carrier's agency mailbox does not comply with the legislative goals set forth in Labor Code §402.021.

Agency Response: The Division disagrees with the recommendation to extend the timeline to respond to 20 calendar days. The Division believes that 14 calendar days is sufficient time to respond to a dispute as it is the intent of the MDR rules to expedite resolution between the disputing parties as set forth in Labor Code §402.021. The Division clarifies that the recommendation for the carrier's signature to begin the 14 calendar day timeframe is outside the scope of this rule and is established by 28 TAC §102.5. However, the Division has revised subsection (d)(1) by inserting the word *calendar* between the words *14* and *days* in both sentences.

§133.307(d)(2)(A)(iii): Two commenters recommend the subsection be modified to require the responding party to only include medical records or documents not provided by the requestor in the original request. A commenter states there is no reason to make both parties file identical records and documentation. The proposed subsection would result in a large volume of duplicate information being submitted as part of the dispute resolution process.

Agency Response: The Division clarifies that subsection (d)(2) requires the respondent to only provide relevant information not submitted by the requestor. The Division revised subsection (d)(2)(A)(iii) to further clarify that only additional information not submitted by the requestor is required.

§133.307(d)(2)(A)(v): A commenter opposes this subsection, believing that it shifts the burden of proving fair and reasonable reimbursement from the health care provider to the carrier. The commenter states that case law and prior rules have supported the placement of the burden on the provider to prove that what is charged is a reasonable and necessary fee. The commenter feels providers should have the burden to show that what they charge is reasonable. Such as an exemption that allows providers to go outside of a fee guideline if the charge can be justified. The commenter believes statutory support exists for placing the burden on provider.

Agency Response: The Division disagrees this provision places the burden of proving fair and reasonable reimbursement on the carrier only. Section 133.307 requires the provider and carrier to submit documentation that discusses, demonstrates, and justifies that the payment amount being sought by the provider and reimbursed by the carrier is a fair and reasonable rate. Further, the requirement that carriers provide documentation supporting a fair and reasonable reimbursement is consistent with the requirements of 28 TAC §134.1 and Labor Code §413.011.

§133.307(d)(2)(B): Several commenters recommend either deleting subsection (d)(2)(B) in its entirety or modifying it to allow carriers to provide additional evidence to support the reason for reduction or denial of payment. The commenters state that the subsection is applied unfairly because there is no similar restriction placed on health care providers. One commenter states that if a carrier denies payment on the basis of compensability, other threshold issues may not be addressed and it may be necessary for the carrier to enter these additional reasons into the record as part of the MDR process. It would be inefficient for the system to require the carrier to audit for both compensability and medical necessity for services that the carrier determines to be noncompensable. Further, compensability may be disputed after a request is filed but before a response is provided. In this situation, it would be appropriate to add this information. The commenter believes the carrier's ability to enter additional information is limited, but that the provider's ability to enter additional information is not limited. Several commenters believe subsection (d)(2)(B) is in fact a waiver provision for carriers; carriers waive any defenses not listed on DWC-62 even though there is no statutory basis for wavier in Labor Code §413.031. A commenter believed subsection (d)(2)(B) was an inoperable pleading requirement, which prevents the Division from addressing problems that often end up in litigation instead

of being resolved in mediation. The commenter feels that by not addressing issues in the mediation process the Division perpetuates an unresolved issue. The commenter is unaware of any other adjudicative process that limits a party to the defenses they raised during the mediation process. One commenter states that in a Travis County district case, *Texas Mutual Insurance Company v. Texas Workers' Compensation Commission*, Cause No. GN501779, the Division entered into an agreement that lack of specificity on an EOB is not a basis for ordering the carrier to pay. Subsection (d)(2)(B) is also in conflict with Texas Labor Code §408.027, which allows carriers to audit medical bills within 160 days after receipt of the medical bill and after making the initial payment within 45 days. Additionally, several commenters believe that subsection (d)(2)(B) also creates a due process conflict with proposed §133.307(e)(3), which allows the Division to raise issues in the MDR process if appropriate to administer the medical dispute process consistent with the Act. Commenter estimates that this subsection would have resulted in a $43 million dollar overpayment in medical bills in 2003.

Agency Response: The Division disagrees that this subsection should be deleted or that the subsection creates a due process conflict with §133.307(e)(3). Labor Code §402.061 provides the commissioner of workers' compensation with the authority to adopt rules as necessary to implement and enforce the Workers' Compensation Act. These rules provide the process for accomplishing resolution of disputes in a timely and fair manner by allowing health care providers the opportunity to timely address all the reasons for denial or reduction of its bill. In order to timely resolve medical fee disputes, the health care provider must have and is entitled to notice of all the reasons for denial or reduction of its bill. However, the Division has revised subsection (d)(2)(B) to allow a carrier to submit a subsequent response when a final decision is rendered regarding threshold issues such as compensability, extent of injury, liability, or medical necessity. Medical necessity reviews require an adverse determination in accordance with 28 TAC §19.2005 and subsection (d)(2)(E) has been added to allow carriers to bring up the issue of medical necessity by providing documentation that supports an adverse determination in accordance with §19.2005. Additionally, the language in §133.305(b) has been revised to clarify the appropriate sequence with the resolution of medical fee disputes The Division disagrees with commenter's characterization regarding the agreed orders entered in the Travis County district court case because the case involved a different rule and the agreed orders were specific to the facts of that case. The Division further disagrees that the rule is in conflict with Labor Code §408.027 because the rule does not alter those timeframes. Finally, the Division disagrees that §133.307(e)(3) ((e)(2) as adopted) presents a due process conflict because the Division will forward any additional information requested by the Division to the parties and will accept responses to additional issues raised by the Division in accordance with §133.307(e)(1). In order to clarify subsection (e)(1), the Division has added the sentence that states "[t]he Division shall forward any additional information received by the parties."

§133.307(d)(2)(C): A commenter recommends this subsection be amended to require the carrier to submit a written statement that the carrier did not receive information relevant to the dispute prior to the MDR request. The commenter states the subsection does not clarify whether an affidavit or written statement is required. Further, the commenter suggests a written statement would be the lowest overall cost to the system.

Agency Response: The Division agrees with this recommendation and subsection (d)(2)(C) has been changed by inserting the phrase *include that information in a written statement in the response the carrier submits to* to replace the language *so certify when the carrier files the request form with* to allow a carrier to submit a written statement indicating the carrier has not received the information prior to the MDR request.

§133.307(e)(2): A commenter questions the distinction between medical necessity disputes being dismissed before fee dispute resolution versus disputes involving compensability or extent of injury being abated before fee dispute resolution. The commenter recommends consistency and suggests dismissal for both processes to avoid a pending status and allow the opportunity to re-file and start the fee dispute process.

Agency Response: The Division agrees with this recommendation and proposed subsection (e)(2), regarding abatement of disputes, has been deleted. A provision regarding disputes containing compensability, extent of injury, and/or liability issues has been added in subsection (e)(3)(H), pertaining to Division dismissals. This provides MDR processing consistency for fee disputes containing medical necessity or compensability, extent of injury, or liability issues.

§133.307(e)(3): A commenter recommends that the subsection either be deleted or more specific or detailed language added regarding when the Division may raise issues in the process. System participants will benefit from a detailed clarification of the intent of this provision and examples of this provision, as well as a response mechanism afforded to all parties.

Agency Response: Labor Code §413.031 states that the role of the division, in resolving fee disputes for services determined to be medically necessary and appropriate for treatment of a compensable injury, is to adjudicate the payment, in accordance with the statutory provisions and commissioner rules. Labor Code §413.008 requires carriers (upon request) to submit to Division any information relating to treatment, services, fees and charges. HB 7 enacted Labor Code §402.021 (b)(3) and (5) states that the goal of the Division is to provide appropriate benefits in a timely and cost-effective manner and minimize the likelihood of disputes and resolve quickly when identified. In order to adequately administer the intent of HB 7, and comply with statutory provisions, the Division must be able to obtain relevant and necessary information in order to determine fundamental issues regarding fee disputes. The Division must also administer the MDR process consistent with the provisions of the Labor Code and Division rules. It is not feasible for a list of examples and response mechanisms to be included in the rule as such a list may limit the scope of the Division's duties and different issues may require different response processes. Therefore, the division declines to either delete or revise subsection (e)(3) ((e)(2) as adopted).

§133.307(e)(4): Commenters recommend that dismissals of a dispute be mandatory for each of the enumerated situations listed in the subsection by using the words *shall* or *must* instead of *may*.

Agency Response: The Division declines to make this change. Subsection (e)(4) ((e)(3) as adopted) relates to actions taken by the Division and, as such, regulatory language is not required. The Division will consistently apply the criteria in this subsection for dismissals but will maintain its independent duty to provide for exceptions as needed in order to accomplish the intent of HB 7 and other statutory provisions.

§133.307(e)(4): A commenter requests clarification regarding dismissals and recommends incorporating in the rule a procedure to address cases where an injured employee disagrees with the Division as to whether the MDR request is untimely. Such clarification would prevent injured employees from getting lost in the system. A dismissal is not a final decision, and once a dispute has been dismissed there is no process in the rule by which an injured employee may dispute the dismissal. The commenter questions whether a dismissal is an exhaustion of administrative remedies.

Agency Response: The Division disagrees that subsection (e)(4) ((e)(3) as adopted) requires clarification or a procedure specific to injured employees. A party may request MDR within the time frames provided by subsection (c)(1) and if a party's request is dismissed there is no provision in the rule to prohibit a party from resubmitting a request for MDR as long as they comply with subsection (c)(1). A dismissal of a request for MDR may be a final decision and a party to a medical dispute is entitled to judicial review in accordance with Labor Code §413.031(k), which states that a party to medical dispute that remains unresolved is entitled to judicial review.

§133.307(e)(4)(H): A few commenters request clarification of subsection (e)(4)(H) ((e)(3)(H) as adopted) and question why a request would be dismissed when a non-certified network provider contract does not comply with the cited provisions and is the basis of the disputed reimbursement. One commenter states that MDR should resolve a dispute over reimbursement based on a provider contract that does not comply with the Labor Code. A different commenter questions whether the Division will dismiss medical fee disputes that involve contract rates per Labor Code §413.016(b). A commenter questions where unwarranted discounts taken by the carrier fit in MDR and provides the example of a carrier that uses a billing service and a health care provider that signs a discount contract. In this scenario, the carrier does not have a workers' compensation discount agreement with the health care provider but the network takes a discount, and the commenter asks whether a health care provider access MDR for this scenario.

Agency Response: The Division agrees that some clarification is necessary. Subsection (e)(4)(F) ((e)(3)(F) as adopted) has been revised to provide that the Division will dismiss medical fee disputes regarding contract rates. The Division has no jurisdiction to adjudicate contract disputes between parties regardless of whether hidden discounts exist. Any disputes over the terms of a valid contract between carrier and provider cannot be properly decided by MDR because the Division does not have the authority to negotiate contract terms between carriers and health care providers. In the scenario described by the commenter, the carrier would be unable to produce a valid workers' compensation contract with health care provider therefore the health care provider would be allowed access to MDR. In the absence of such a contract, the Division will apply fee guidelines.

§133.307(e)(5): A commenter recommends the subsection be amended to require the Division to send the MDR decision to the injured employee, as well as to the disputing parties. A few other commenters recommend the MDR decision be sent to a party's representative if the party was represented during the MDR process.

Agency Response: The Division clarifies that the intent of subsection (e)(5) ((e)(4) as adopted) is to notify the identified disputing parties. However, the Division agrees that a representative of record for a party, such as an attorney, should receive notice of the decision and has revised subsection (e)(5) ((e)(4) as adopted) to reflect this change.

§133.307(f): Several commenters state that the proposed rule does not provide for an evidentiary hearing and only offers determinations based on unverified documents. These commenters recommend that medical disputes be resolved according to the provisions of the Administrative Procedures Act (APA) which allows, for example, the right to cross examine and take testimony of witnesses under oath. Failure to conduct proper hearings on medical disputes violates the parties' due process rights and the division's statutory duties. These commenters recommend the rule be amended to provide for an administrative hearing for all medical disputes presided over by either State Office of Administrative Hearings (SOAH) administrative law judges or Division hearing officers. Commenters state an adjudicative process for these disputes should be in place. These commenters also state the legislature and the agency must comply with the Texas Constitution, Labor Code §413.031(k), and Government Code §2001.171.

Agency Response: There are no statutory provisions for the Division to provide administrative hearings for medical fee disputes. Labor Code §413.031(k) does not provide the Division with the authority to create a system for administrative appeals of medical disputes prior to judicial review. Labor Code §401.021 and §408.027(e) do not require hearings for medical fee disputes. Furthermore, HB 7 amended §413.031(k) to specifically delete statutory language that entitled a party with an unresolved medical fee dispute, to a State Office of Administrative Office hearing. The rule's provisions for an informal adjudication were made after the agency made the following constitutional due process analysis of (1) whether any party to a dispute has a constitutional protected property or liberty interest at stake and, if so, (2) what process is due to sufficiently protect that interest. *Bd. Of Regents v. Roth*, 408 U.S. 564, 569-71 (1972). A legitimate claim of entitlement is required for a constitutional property interest. *Nat'l Collegiate Athletic Ass'n v. Yeo*, 171 S.W.3d 863, 870 n. 19 (Tex.2005) and *Bd. Of Regents v. Roth*, 408 U.S. at 577. A health care provider's expectation of additional reimbursement does not rise to a constitutional entitlement. *ElderCareProps., Inc. v. Tex. Dep't of Human Servs*., 63 S.W.3d 551, 556 (Tex.App.-Austin2001, pet. denied). Similarly, an injured employee's request for medical care (or reimbursement for medical care) is not, in itself, a constitutional entitlement. *American Manufacturers Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 60 (1999). Finally, a workers' compensation insurer cannot show that it has a legitimate claim of entitlement to not utilize its required reserves to pay proper medical claims. Each insurer voluntarily agrees to assume obligations to pay claims for health care as required by the Texas Workers' Compensation Act when they voluntarily enter into any insurance contract with an employer. Each insurer must comply with statutory requirements to maintain adequate monetary reserves to pay such claims. Texas Insurance Code Article 5.61. Similarly, no constitutionally protected property interest was found in escrow money that employers were required to pay because they were legislative preconditions for the privilege of engaging in future cigarette sales. *Grand River Enters. Six Nations Ltd. V. Pryor*, 425 F.3d 158, 174 (2nd Cir. 2005, writ of cert. denied in *King v. Grand River Enters. Six Nations Ltd*., 2006 U.S. LEXIS 7501).

§133.307(f): A commenter is concerned that the 30 day deadline for filing a petition for judicial review is not an adequate amount of time for health care providers to assimilate what is required to file and recommends 90 days.

Agency Response: The Division understands the commenter's concern; however, the 30 day deadline is a provision of Government Code, Subchapter G, §2001.176(a).

§133.308(a): A few commenters note that §133.308(a) references §133.309, the validity of which is currently being litigated. One commenter asks what effect an invalidation of §133.309 would have on the §133.308, and another suggests changing the statutory reference to Labor Code §413.031.

Agency Response: The Division is aware of the issue of the commenter's concern, and has changed this subsection to reference Labor Code §413.031(n) rather than §133.309.

§133.308(e)(1): A commenter asserts that Labor Code §413.0111 does not confer health care provider status on pharmacy processing agents, and voices concern that the wording of §133.308(e)(1) unintentionally assigns this status, in excess of Division authority.

Agency Response: The Division notes that the section does not define a pharmacy processing agent as a type of provider, but will make a change to the proposed text in order to address the commenter's concerns by adding the word *or* after the word *provider* and deleting the word *including* before the term *pharmacy processing agents*.

§133.308(e)(3): A commenter requests to know why the proposed subsection excludes non-network employees from medical necessity disputes.

Agency Response: Employees who do not fall under the network requirements are listed as possible parties to a medical dispute, except for certain retrospective medical necessity disputes because once the services have been rendered to the employee the employee would not incur any out of pocket expenses and would not need to access MDR. The language of §133.308(e)(2)(B), as adopted, clarifies this.

§133.308(f): A commenter states that there is a conflict between this subsection and 28 TAC §10.103(a)(4)(B)(iv), because the proposed subsection provides that a request for independent review must be filed in the form and manner prescribed by the Department and the Department's IRO request form may be obtained from either the Department's website or physical address, while §10.103(a)(4)(B)(iv) provides that notice of the requesting party's right to seek review of the denial by an IRO and the procedures for obtaining that review in the form of notice referenced in §10.102(i) of this subchapter. The commenter also notes that §133.308(g) conflicts with 28 TAC §10.104(a)(2) and §133.308(j) conflicts with 28 TAC §10.103(a)(4)(B).

Agency Response: The Division does not agree that a conflict between this subsection and 28 TAC §10.103(a)(4)(B)(iv) exists when both direct a party to the same Internet website and mailing address. Neither does the Division see a conflict between §133.308(g) and 28 TAC §10.104(a)(2); and §133.308(j) and 28 TAC §10.103(a)(4)(B).

§133.308(f): A commenter commends the Division on creating an MDR process that allows injured employees to be a party in the process and thanks the Division for the opportunity to comment on the adopted rules. The commenter recommends that forms for the adopted rules be written for an 8th grade reading level and be available in both Spanish and English, and also recommends that this subsection include a telephone number that injured employees can use to request IRO request forms because many injured employees may not have access to the internet and requesting forms via the phone can save time over mailing in a request and waiting for the forms to be sent through the mail.

Agency Response: The Division appreciates the comment. The Division agrees with the suggestion regarding the readability of the form and is currently developing such a form. Additionally, while an injured employee may not have internet access at home, Internet access and assistance with forms is available at Division field offices in addition to other locations.

§133.308(g): In regard to adopted §133.308(g), a commenter wonders what happens to an injured employee if the provider misses the 45th day. The commenter also asks what happens if there is a change in condition after the 45th day or if the carrier and provider agree to a treatment plan that does not include the requested service, but after the 45th day the provider decides the requested service is necessary.

Agency Response: If a request for independent review is not filed before the 45th day, the Department may dismiss the request for medical necessity dispute resolution as untimely pursuant to §133.308(h)(5). If an injured employee has a change of condition after the 45th day that causes the provider to believe the denied treatment has become medically necessary, a new preauthorization process would commence based on the change of condition.

§133.308(g): A commenter notes that adopted §133.308(g) states: "[a] requestor shall file a request for independent review with the insurance carrier (carrier) or the carrier's utilization review agent (URA) no later than the 45th day after the denial of reconsideration" and asks if the rule means 45 calendar days, from what point the count of 45 days begins, and if the 45th day would be different if the person is notified by mail or notified by fax.

Agency Response: The Division has changed the text of the subsection to clarify that the count of 45 days begins upon receipt of the denial of reconsideration and that the 45 days are calendar days by inserting the word *calendar* after *45th* and before day and inserting the words *receipt of* after the words *day after* and before the words *the denial of reconsideration*. The Division also inserted in §133.307(d)(1) the word *calendar* between the words *within 14* and *days after* for language consistency.

§133.308(g): Concerning this subsection, a commenter states that requiring a carrier or URA to forward the request for IRO to the Division puts an onerous burden on the carrier or URA. The commenter asserts that this is an unnecessary step, as the Division is ultimately the entity to appoint the IRO.

Agency Response: The Division declines to make the requested change because Insurance Code Article 21.58A, §6A requires the carrier or URA to forward the request to the Department.

§133.308(h): Commenters recommend that the proposed section be changed by deleting the word *may* and inserting the word *shall* or *must* before the phrase *dismiss a request for medical necessity dispute resolution if* in proposed §133.308(h). Dismissal of the dispute should be mandatory for each of the enumerated situations because the Division has consistently determined that the listed items are valid reasons to deny access to the MDR process.

Agency Response: The Division disagrees with the recommendation because each case will be slightly different, and the Division believes that the best approach is to allow discretion for a determination on a case-by-case basis.

§133.308(h)(3): A commenter requests that this section be revised to state that a requestor does not have to seek reconsideration of a determination on a life-threatening condition prior to seeking an IRO determination, and recommends that the section be changed to state "the Department determines that the dispute involving a non-life-threatening condition has not been submitted to the carrier for reconsideration."

Agency Response: The Division notes that §133.308(g) already provides that an employee with a life-threatening case is entitled to an immediate review by an IRO and does not need to go through reconsideration. However, for clarification, the Division has made the requested change to subsection (h)(3).

§133.308(j): Commenters assert that three working days is an unreasonable amount of time for a party to provide all the pertinent information required in a medical necessity dispute. One commenter asserts that three days is unreasonable because the carrier is being asked to provide all the documentation even when it is the medical provider who requested the dispute resolution. A second commenter asserts that it is unlikely the IRO will have a file set up to receive documents within such a short time period. The commenters suggest that the subsection be changed to allow a carrier seven days or 10 working days to provide required documentation.

Agency Response: The Division disagrees with the commenter that there is statutory authority to extend the time frame beyond three days, because Insurance Code Article §21.58A, §6A(2) and Insurance Code §1305.355(a)(2) require documents to be provided within three days. The Division notes that the carrier or its URA is only required to submit documentation that was used to make the initial adverse determination and for the reconsideration, and is therefore already in the possession of the carrier or the URA. However, in §133.305(a)(2), the Division has added a definition of *adverse determination* for clarification of the meaning of that word in these rules.

§133.308(j): In regard to §133.308(j), a commenter notes that in practice it is typically a URA that is making a utilization review decision and that as the system is designed carriers are usually just doing bill review. The commenter suggests that the language of the rule be changed to reflect actual practice of carriers. The commenter notes that the time frames have been set by the legislature.

Agency Response: The Division has taken the practices of carriers into consideration in writing the adopted rules, and would point out that adopted §133.308(j) states "[t]he carrier or the carrier's URA shall submit the documentation required...." Some carriers do perform utilization review and do send in IRO requests. Carriers are required under Insurance Code Article 21.58A to adhere to the IRO law.

§133.308(k): A commenter states that adopted rule §133.308(k) conflicts with 28 TAC §10.104(a)(2) because it adds a requirement not found in §10.104(a)(2). The commenter also asserts that the subsection adds a requirement not actually seen in the Texas Department of Insurance rules. The commenter believes that if an IRO can request additional information, then all parties should be notified of the request, allowed to review the information when it is provided, and allowed to respond to the information. The commenter says that the confidentiality requirements of the IRO process are a problem because the parties do not know who the IRO is or what the IRO is reviewing.

Agency Response: The Division does not agree that a conflict between proposed §133.308(k) and 28 TAC §10.104(a)(2). Section §10.104(a)(2) lists specific items that are to be provided by a carrier, and §133.308(k) allows an IRO to request any additional relevant information from parties or other providers. The Division anticipates that parties will follow all the rules promulgated by the Texas Department of Insurance, including §10.104 and §133.308. At the outset of the IRO review parties are allowed to provide any documents they feel are relevant to the review. The purpose of the IRO review is to review documents and determine medical necessity. The confidentiality of who does a review for an IRO is a legislative mandate contained in Insurance Code Article 21.58C, §2(h).

§133.308(k): A commenter requests that the date of receipt of the dispute be defined as the date of receipt of all necessary documents and states that the Division has variously designated receipt of the request form or payment as the start of the dispute process and asserts that neither the data contained on the form nor the data on the payment check comprise information that has a direct bearing on quality of the review, which is to determine medical necessity. The commenter explains that this subsection does not provide any time allowance for the IRO to receive the necessary records to conduct a quality review and explains that the time element of the process is a major determinant of the quality of the IRO review.

Agency Response: The Division disagrees with the suggested change because it is unnecessary. Insurance Code Article 21.58C already requires the IRO to render its decision not later than the earlier of either (a) 15 days after receipt of information necessary to make the determination or (b) 20 days after the date the IRO receives the request that the determination be made.

§133.308(k)(1): A commenter asks that this subsection be changed to clarify the identification of who is considered a party to the dispute. The commenter refers specifically to the language that states "if the provider requested to submit records is not a party to the dispute, then copy expenses for the requested records shall be reimbursed by the carrier." The commenter asserts that the subsection does not indicate what constitutes a provider as a party of the dispute and therefore is gray.

Agency Response: The Division disagrees with the commenter's requested change to this subsection because further identification of the parties is not necessary. The commenter is advised that §133.308(e) already specifies who can be a requestor in preauthorization, concurrent, and retrospective medical necessity dispute resolution. A party may be either an entity who files a request for independent review or an entity that is called upon to respond to a request for independent review. There may be other providers whose records are relevant to the review that are called upon to submit records, but who are not parties to the review. However, the Division agrees to add the additional phrase *or providers with relevant records* after the words *the party* and before the words *shall deliver* in the first sentence of this subsection for clarification.

§133.308(k)(3): A commenter states that allowing the Division to bring an enforcement action against a carrier if the carrier fails to provide the requested information as directed by the IRO or the Division is too harsh, considering that only three days are allowed to provide the document. The commenter suggests that either §133.308(k)(3) be deleted or that an enforcement action only be allowed if the failure to provide the documents is made in bad faith.

Agency Response: The Division disagrees that the suggested changes are necessary. Insurance Code Article 21.58A, §9 gives the Department and the Division the authority to enforce the law. This section does not impose such a limitation as requested.

§133.308(l): A commenter states that failure to appear at a designated doctor examination increases costs, delays resolution of the dispute and shows a disregard for the process. Another commenter notes that scheduling multiple examinations would lead to a lengthier, costlier dispute resolution process. The commenters suggest that this subsection be modified to provide that a dispute is dismissed with prejudice if a claimant fails to attend a scheduled designated doctor examination without a good faith reason.

Agency Response: The Division agrees in part, but does not believe that dismissal must be mandatory and declines to change this subsection because the language in subsection (h)(7) already addresses the commenter's concerns.

§133.308(l): A commenter notes that the nature of designated doctor exams makes them appropriate only to address future or ongoing issues, not to address the medical necessity of services that have been delivered in the past. The commenter suggests limiting IRO requests for a referral to a designated doctor to preauthorization or concurrent review.

Agency Response: The Division disagrees that this language change is necessary. Labor Code §408.0041 does not appear to contain any language to authorize limiting IRO requests for a referral to a designated doctor to solely preauthorization or concurrent review.

§133.308(m): In regard to the time-frame for IRO decisions set out in §133.308(m), a commenter notes that the commenter would not want to wait over a week for a decision in the case of a life-threatening situation.

Agency Response: The Division notes that Insurance Code Article 21.58C, §2(c)(2)(B) specifically sets forth the eight day timeframe for life-threatening situations.

§133.308(m): A commenter requests that the timeframes in this subsection be revised so that they are consistent, stating that this subsection creates the basis for three separate levels of quality because it sets forth different time frames and initiation measures depending upon whether the case is an emergency, or requires preauthorization or concurrent, or retrospective review; thus creating three separate tracks for IRO reviews that will entail three separate quality measurement procedures. The commenter believes that for consistent quality an IRO review must consist of the same tasks and time allowed for each task regardless of the class of the request; and medical necessity is not related to the class of request. Further, the commenter asserts that: it should be mandatory that any quality monitoring process be consistent, understood, and have uniform measures; all types of cases should have a sufficient time for a quality review after the IRO receives adequate medical information.

Agency Response: The timeframes to which the commenter is referring are consistent with those set forth Insurance Code Article 21.58A and Insurance Code Chapter 1305. Preauthorization is not required for emergency services.

§133.308(n): A commenter requests that this subsection state the time frame allowed for judicial review so that the injured employee may take appropriate action to obtain an attorney and file a petition in district court within 30 days, which will help insure that an injured employee's case is not discarded on a technicality. The commenter further notes that making injured employees aware of the 30-day filing period would help injured employees assert their appellate rights and reduce complaints from injured employees dissatisfied with the results at the administrative level.

Agency Response: The Division declines to make the commenter's requested change because subsection (r)(1) already sets forth the appeal timeframe and subsection (n) incorporates this section by reference.

§133.308(n): A commenter recommends that injured employees receive all notices and responses of a request of an IRO review, regardless of whether the injured employee is considered a party in the process. The commenter says it is imperative to keep the injured employee informed of disputes based on health care that he or she received, and notes that increased communication is one of the goals of HB 7. Commenter asserts that keeping the injured employee informed at the various stages of the MDR process aids in communication for all workers' compensation system participants and provides injured employees with necessary information about their individual claim and appellate rights, and recommends that the words *and the injured employee* be added after the words *to the parties* and before the words *transmitted to* in this subsection.

Agency Response: The Division declines to make the suggested change because IROs are already required under 28 TAC §12.206 to send the determination to the injured employee or his representative in all cases. However, in subsection (n), the Division has added the words *and to representatives of record for the parties* between the words *the parties* and *and transmitted* for clarification of to whom the IRO decision must be mailed or transmitted.

§133.308(n): A commenter states that the IRO should be required to send the injured employee notice of the injured employee's right to appeal the IRO decision, regardless of whether the injured employee is the requestor or is considered to be a party. The commenter asserts that notice of the injured employee's right to appeal should be required by rule, should be attached to the body of the IRO decision, and should include the timeframe in which the IRO decision can be appealed.

Agency Response: An injured employee always has the right to file an appeal when the employee is a party. Labor Code §413.031(k) only allows a *party to a medical dispute* to seek judicial review of an IRO decision. If an injured employee is not a party in the IRO, he or she does not have a right to appeal the IRO decision and the Division does not have the authority to create such a right by rule. In addition, because Labor Code §413.032 specifies the elements that are to be included in the IRO decision, and the timelines for appeal filing are not one of those elements, the Division declines to make the suggested change. However, the Division anticipates that IROs may offer timeline information or refer injured employees to the Division field offices for further assistance with an appeal as a good customer service practice.

§133.308(n): A commenter suggests that an appropriate customer assistance telephone number should be required as a part of the required notice (within the body of the IRO decision) to field questions regarding the dispute process, particularly for spinal surgery cases. The commenter suggests, at a minimum, requiring IRO decisions to publish either the Texas Department of Insurance or the Office of Employee Counsel's contact infor-

mation in order to assist injured employees through this complex process.

Agency Response: The Division declines to make the suggested change because Labor Code §413.032 specifies the elements that are to be included in the IRO decision, and agency telephone numbers are not one of those elements. However, the Division anticipates that IROs may offer the Department's telephone number or refer injured employees to Division field offices for further assistance with an appeal as a good customer service practice.

§133.308(n)(1)(B) and (r)(2)(H): A commenter objects to screening criteria in general and specifically objects to the inclusion of a laundry list of screening criteria in the proposed rules and related forms because inclusion of such specific information would eventually become obsolete and outdated and necessitate rule changes; a prudent and effective document control procedure for screening criteria is required so that revisions to such are acknowledged, tracked, and updated.

Agency Response: Labor Code §413.031(e-1) specifies that guidelines must be considered. The Division is unable to identify a laundry list of screening criteria or guidelines in the proposed rule language that requires the suggested change.

§133.308(n)(1)(G): The commenter requests that this subsection be revised to state that if a requestor specifies that guidelines be reviewed then that specification be included in the request submission because the practice of IROs independently citing guidelines or screening criteria creates opportunities for ambiguity and results in a broadening of issues for appeal.

Agency Response: The Division declines to make the suggested change because it is unnecessary. Guidelines must be considered by the IRO pursuant to Labor Code §413.031(e)(1). Under that subsection, the IRO must explain if there is a divergence from the guidelines. Additionally, Insurance Code Article 21.58A, §6A(2)(B) requires the URA to provide any documents used by the plan in making the adverse determination to the IRO.

§133.308(o): A commenter requests that the language in this subsection be revised, because as currently drafted it prohibits the carrier from using a peer review report for any subsequent denials of the same claim if the IRO determines that medical necessity exists for a disputed health care service and no reason exists to prohibit the use of the peer report for health care services that were not reviewed within the scope of the IRO determination. Another commenter recommends amending this subsection by changing the title to *Carrier use of peer review* and adding the additional words *for the same dates of health care services* at the end of the provision to narrow the scope of the subsection, which the commenter believes is overly broad when it proscribes the use of a peer review for services that an IRO decision may not even address. The commenter further states that because IRO decisions only address the medical necessity of *claims* for services rendered on certain dates, an IRO decision that conflicts with a peer review should not also preclude use of that same peer review rendered on future dates. A commenter states that this proposed subsection must be revised because, if the medical dispute goes up on the necessity of only one aspect of what a peer has opined, then the restriction should only apply to that one aspect. The commenter provides this example: if a peer review addresses medications, work hardening, and durable medical equipment. If the requestor only pursues the work hardening and prevails, then the carrier should still be able to use the peer review on the issues of medications and durable medical equipment. Another commenter requests that this subsection should be deleted or amended because while the peer review report may address a number of medical services or other non-medical benefits issues, the IRO decision may only address one or a few of the medical services addressed by the peer review report and believes that it would be unfair to prohibit the insurer from utilizing the peer review report for subsequent medical necessity denials for services not addressed by the IRO in the same *claim* when the IRO agreed with the peer review report in part and disagreed with the peer review in part. Another commenter requests that this subsection be deleted or amended because while the peer review report may address a number of medical services, the IRO decision may only address one or a few of the medical services addressed by the peer review report and it would not be fair to prohibit the carrier from utilizing the peer review report for subsequent medical necessity denials for services not addressed by the IRO in the same *claim*. Likewise, it would not be fair to prohibit the carrier from utilizing the peer review report for subsequent medical necessity denials when the IRO agreed with the peer review report in part and disagreed with the peer review in part.

Agency Response: The Division agrees and has clarified the language in this subsection to say that the peer review report that has been overturned by the IRO shall not be used for subsequent medical necessity denials of the same health care services subsequently reviewed for the compensable injury. The Division agrees with the commenter to make a similar language change to the title of this subsection by revising the title to *Carrier Use of Peer review after an IRO Decision* and has added the phrase *health care services subsequently reviewed for that compensable injury* and deleting the words *the same claim* at the end of the provision to clarify and appropriately narrow the scope of the subsection.

§133.308(o): A commenter notes that the term *claim* in the proposed rule appears to refer to the claim for the *specific health care* denied by the carrier, as interpreted in the former version of §133.308(p)(6). The Commenter asserts that the removal of the phrase *disputed health care* from the proposed rule, in conjunction with the customary understanding of a *claim* as a claim for compensation in its entirety, will lead to confusion. The commenter notes that peer review reports may not restrict their opinions to the medical necessity of the specific medical condition, illness or injury subject to the instant IRO review and a literal application of the proposed rule would render the entirety of each peer review reviewed during an IRO process valueless, even with respect to matters not subject to the instant IRO review.

Agency Response: The Division agrees that clarification is necessary and has added language to state that the peer review report that was overturned by the IRO may not be used for subsequent medical necessity denials of the same health care services subsequently reviewed for the compensable injury. In addition, the Division agrees to revise the title of the section by adding the words *peer review report after an* after the words *use of* and *IRO Decision*.

§133.308(p): A commenter states that the proposed subsection is not acceptable as it is written and urges the harmonization of payment terms in this subsection. The commenter believes changes to the proposal are necessary to prevent IROs from performing tasks and accruing expenses without being assured payment. Additionally, the commenter is surprised that the Division and the Department failed to consider the agreement reached in January 2002 between the Texas Workers' Compensation Com-

mission (TWCC) and various groups, including the commenter, relating to payment of IRO fees. At that time, asserts the commenter, it asked for and received the blessing from TWCC that it would receive payment up front.

Agency Response: The Division disagrees that the proposed rule creates a high risk that an IRO will perform tasks and not receive payment. Section 133.308(p)(4) requires payment by the specified party to be made within 15 days of receipt of the invoice and provides for enforcement action where payment is not made. If the IRO is not paid, the Division has the authority to take enforcement action as specified in subsection (u).

§133.308(p)(2)(A): A commenter requests that the proposed subsection be revised to avoid requiring the carrier to pay the IRO fee for all concurrent review medical necessity disputes, because there is no reason to make the carrier responsible for the fee in those IRO concurrent reviews where the carrier is the prevailing party. According to the commenter, the non-prevailing party should always be responsible for the costs of the IRO dispute; though the statute requires the carrier to pay the costs in the preauthorization contest, there is no such statutory requirement for concurrent review disputes. The commenter further states that the proposed rule encourages the filing of baseless IRO disputes on concurrent reviews, adds costs, and delays to the system. Another commenter requests that this subsection be amended by adding a provision to require that the health care provider pay the IRO fee for disputes related to concurrent review based upon the rationale that the proposed process, which allows for unlimited concurrent review disputes with no cost to the requestor, adds burden and cost to the system with no tangible benefit. According to the commenter, Labor Code §413.031(h) does not require carriers to pay the initial cost for disputes related to concurrent review, only to pay for those related to preauthorization.

Agency Response: The Division disagrees that the requested change is necessary. Under 28 TAC §134.600, concurrent review is a continuation of preauthorization and therefore the payment requirement applies.

§133.308(p)(3): A commenter notes that the former version of §133.308 assigned the cost of a designated doctor exam to the party liable for the IRO fee, rather than specifying that the carrier was liable for the expense as is set out in the proposed version. The commenter says that the shift of liability in the proposed rule is unclear, because a carrier is only required to pay for the costs of IRO reviews of medical necessity, as per Labor Code §413.031(h), in regard to preauthorization/concurrent review issues arising under Labor Code §413.011(g) or treatment plans relating to disability management under Labor Code §413.011(g). The commenter states that designated doctor exams requested by IROs should be taxed as IRO review costs to the non-prevailing party in retrospective reviews where permitted.

Agency Response: The Division disagrees, because Labor Code §413.031(g) states that an IRO may request that the commissioner order a designated doctor exam under Labor Code Chapter 408, and Labor Code §408.0041(h) states that the carrier is liable for expenses of the examinations listed in that subsection.

§133.308(p)(5): A commenter asks about the language *but not later than 15 days* and asks whether this refers to 15 days from receipt of the IRO notice. A commenter requests that the Division lengthen the time-frame listed in this subsection from 15 working days to 20 because time-frames are often hard to comply with in a physician's office where the health care provider may be out of the office for two weeks at a time. Additionally, the commenter notices that in this process there is nothing addressed in change of condition or if the carrier and the health care provider make some arrangement to try some other avenue of patient care. The commenter would like to see that if there is a major change in a patient's condition that they can just communicate with the carrier and are not caught up in having to go to MDR.

Agency Response: The Division declines to change the language to lengthen the timeframe because the Division expects the parties to make arrangements as necessary in order to comply with the law. In addition, if there is a change in condition a new preauthorization process would start that would not necessarily lead to MDR, but could.

§133.308(p)(7): A commenter states that there should be a timeline for withdrawal of an IRO request which allows the request to be cancelled with no fee. The commenter suggests allowing seven or five days for such a cancellation.

Agency Response: The Division disagrees that this change is necessary because the rationale of the IRO withdrawal fee is to reimburse the IRO for the various expenses it incurs.

§133.308(p)(7): A commenter is gratified to see the new provision for the IRO withdrawal fee.

Agency Response: The Division appreciates the comment.

§133.308(q): A commenter states that since this subsection states the carrier has defense to a medical necessity dispute if it timely complies with the IRO decision then there should be a provision here requiring payment of interest to the health care provider for failure to pay within a timely manner. The commenter also asks whether the payment of the medical bill must be made regardless of appeal.

Agency Response: The Division declines to make a change because Labor Code §408.027 requires carriers to pay bills in a timely manner and subsection (u) provides that the Division may pursue enforcement action if carriers fail to make timely payments. Yes, payment of a medical bill must be make regardless of appeal, based upon Labor Code §413.031(m), which provides that IRO decisions are binding during the pendency of a dispute.

§133.308(q): In regard to §133.308(q), a commenter notes that allowing an IRO decision to be received, then processed by the provider is a good sequence, but adds that the section should be conditioned upon final resolution of the medical necessity dispute.

Agency Response: The Division disagrees with commenter's suggestion. Pursuant to Labor Code §413.031(m), the decision of an IRO in regard to a medical necessity dispute is binding during the pendency of a dispute.

§133.308(r): A commenter is concerned about the IRO decision and whether it is enforceable, given that the Division and the Department are specifically excluded from being parties to the IRO decision; and asks whether there will be a vehicle for judicial review contained in the rules, because under the Government Code there must be a review of an agency decision to invoke the substantial evidence rule.

Agency Response: Labor Code §413.031(k) provides that, except in spinal surgery cases, a party to a medical dispute that remains unresolved after a review of the medical service may seek judicial review of the decision, which shall be conducted in

the manner provided for judicial review of contested cases under Subchapter G, Chapter 2001, Government Code.

§133.308(r): A commenter requests that language be added to this subsection to specify who must pay for the cost of copying, noting that the IRO fee does not include the cost of copying.

Agency Response: The Division disagrees that a change to this section is necessary. Subsection (r)(1) already states that "[t]he party requesting the record shall pay the IRO copying costs for the record."

§133.308(r): A commenter requests that this subsection specify that the Division will be the actual custodian of record and will prepare and certify the record because, as proposed, the rule requires the IRO to be custodian of record. The commenter asserts that this places an undue burden on the IRO because the IRO is not equipped to prepare a record, will not get reimbursed for the record, and lacks the authority to actually certify a record that is to go before a district court.

Agency Response: The Division declines to make the commenter's requested change because Labor Code §413.031(k) specifically provides that the Division and the Department are not to be parties to the medical dispute though judicial review is to be conducted *in the manner* provided under Government Code Chapter 2001, Subchapter G.

§133.308(r): A commenter strongly urges that a provision be inserted in this subsection prohibiting an IRO from being a party or a testifying or consulting witness in any appellate proceedings.

Agency Response: The Division does not have the statutory authority to make the requested change. It is not in the Division's authority to determine who can be party to a case.

§133.308(r)(1): A commenter requests that the language in this subsection be revised to state that if an appealing party prevails, then the IRO should refund all copying costs to the appealing party, based upon the rationale that if the appealing party prevails, then one can assume that the IRO made a mistake from which it would be improper for one to profit. The commenter notes that in such a situation the appealing party would have had to spend money on legal representation to overturn the IRO's mistake.

Agency Response: The Division declines to make the requested change because there is no statutory authority upon which to base this suggested change.

§133.308(r)(1): A commenter requests that this provision be revised to state that an appeal is final on the date the appeal is signed, instead of when the decision is received. Citing Government Code §2001.176(a), which allots 30 days on which to appeal a final and appealable decision, the commenter believes a distinction needs to be made between final, and final and non-appealable decisions when the judgments are final upon their signing instead of upon receipt by a party, noting the importance of such distinction when the 30 days allowed for appeal runs from the date an appeal is final.

Agency Response: The Division declines to make the commenter's requested change in this section because in order to appeal an IRO decision, a party must have received a copy of it and thus subsection (n) provides for this.

§133.308(r)(2): A commenter requests the additional words *all documents submitted to the IRO by either party and* be added between the phrase the *record shall include* and the phrase *the following documents that are in the possession of the IRO and which were reviewed by the IRO in making the decision* because the appellate record should include all documents submitted to the IRO by either party and all documents reviewed by the IRO during the dispute.

Agency Response: The Division agrees to make a similar, but different change to the subsection by inserting the word *including* after the words *making the decision* and the colon. The word *including* means *not necessarily limited to*, which will help clarify that the record could include items not enumerated in subsection (r)(2)(A) - (J), but nevertheless reviewed by the IRO in making its decision.

§133.308(r)(2): A commenter requests that the language in this subsection be revised to provide that the Division compile the record for appeal of the IRO decision and the Division determine the prevailing party because (1) IROs may not want to or may not be qualified to determine the prevailing party (e.g. especially in a split decision); (2) this subsection is in conflict with the Government Code, which requires the Division to create the record; and (3) the determination of the prevailing party is very important because the burden of proof essentially shifts.

Agency Response: The Division disagrees that the requested change is necessary because Labor Code §413.031(k) specifically provides that the Division and the Department are not considered to be parties to the medical dispute for purposes of judicial review of the decision.

§133.308(r)(2)(H): A commenter recommends deleting §133.308(r)(2)(H), based upon the rationale that any pertinent medical literature or documentation relied on by the IRO as part of the IRO's decision should be included with the decision and not tacked on as additional documentation in the record after the decision.

Agency Response: The Division declines to make the commenter's requested change because subsection (r)(2)(H) does not imply that the IRO decision should not include the elements listed in subsection (r)(2)(H). The Division agrees that the IRO decision should list or describe (though not necessarily contain) *any pertinent literature or documentation relied on by the IRO as part of the IRO's decision* because Labor Code §413.032(a)(1) specifies that the IRO decision shall include all medical records, as well as *other documents reviewed by the organization*. Paragraph (2) merely describes what information should be included with the record for non-network appeals.

§133.308(s): A commenter states that the language in this subsection should provide that the written appeal should also be sent to the injured employee's treating doctor, in addition to both parties to the proceeding (the carrier and injured employee) and the Division's Chief Clerk as required by 28 TAC §142.5(c), because providing the written appeal to the health care provider and treating doctor increases communication within the workers' compensation system, which will likely prevent injured employees from being barred from the dispute resolution system based on a technicality.

Agency Response: 28 TAC §142.5(c)(1)(E) requires the request for a benefit contested case hearing to be delivered to all the other parties as provided by §142.4 of this chapter. Section 142.4 states that a party who sends a document relating to a benefit contested case hearing to the Division shall also deliver copies of the document to all other parties. If the treating doctor is a party to the dispute he will be copied.

For with changes: American Insurance Association; Barnes, Anderson, Jury & Brenner; Concentra, Inc.; Downs Stanford, P.C.; Envoy Medical Systems. L.L.C.; Fair Isaac Corporation; Flahive, Ogden & Latson; Hassle-Free Pharmacy Services; Insurance Council of Texas; Law Offices of John D. Pringle; MedPro Clinics; North Texas Pain Recovery Center; Office of Injured Employee Counsel; State Office of Risk Management; Texas Mutual Insurance Company; The Boeing Company; The RSL Group, Inc.; Workers' Compensation Pharmacy Alliance; and Zenith Insurance Company.

Against: None.

The sections are adopted pursuant to Labor Code §§401.024, 402.083, 408.0041(a), 408.027(g), 408.0271, 408.031(a), 413.002(d), 413.0111, 413.020, 413.031, 413.031(b), (c), (e), and (g), 413.032(a), 413.0511(b)(8), 413.0512(c), 402.00111, 402.061, Insurance Code Article 21.58A §14(c) and Government Code §2001.177(a). Labor Code §401.024 authorizes the commissioner to require by rule the use of facsimile or other electronic means to transmit information. Section 402.083 provides that information derived from a claim file regarding an employee is confidential. Section 408.0041(a) provides that at the request of a carrier or an employee, or on the commissioner's own order, the commissioner may order a medical examination to resolve any question about the impairment caused by the compensable injury. Section 408.027(g) provides that §408.027 and §408.0271 apply to health care provided through a workers' compensation health care network established under Chapter 1305 and that the commissioner of workers' compensation shall adopt rules as necessary to implement the provisions of §408.027 and §408.0271. Section 408.0271 states that if health care services provided to an employee are determined by the carrier to be inappropriate, the carrier shall notify the provider in writing of the carrier's decision and demand a refund of the portion of payment on the claim received by the provider for the inappropriate services and the provider may appeal such a carrier's determination no later than the 45th day after the date of the carrier's request for the refund. Section 408.031(a) allows injured employees to receive benefits under a workers' compensation health care network established under Insurance Code Chapter 1305. Section 413.002(d) provides that if the commissioner determines that an IRO is in violation of Labor Code Chapter 413, rules adopted by the commissioner under Chapter 413, applicable provisions of Labor Code Title 5, the commissioner or a delegated representative shall notify the IRO of the alleged violation and may compel the production of any documents or other information as necessary to determine whether the violation occurred. Section 413.0111 provides that the rules adopted by the commissioner for the reimbursement of prescription medications and services must authorize pharmacies to use agents or assignees to process claims and act on behalf of the pharmacies under terms and conditions agreed upon by the pharmacies. Section 413.020 provides the authority to adopt rules which enable the Division to charge a carrier a reasonable fee for or access to evaluation of health care treatment, fees, or charges. The section also provides that the Division may charge a provider who exceeds a fee or utilization guideline or a carrier who unreasonably disputes charges that are consistent with a fee or utilization guideline a reasonable fee for review of health care treatment, fees, or charges. Section 413.031 specifies the processes for an IRO decision and appeal and states that the commissioner by rule shall specify the appropriate dispute resolution process for fee disputes in which a claimant has paid for medical services and seeks reimbursement. Section 413.031(b) provides that: a provider who submits a charge in excess of the fee guidelines or treatment policies is entitled to a review of the medical service to determine if reasonable medical justification exists for the deviation; a claimant is entitled to a review of a medical service for which preauthorization is sought by the provider and denied by the carrier; and the commissioner shall adopt rules to notify claimants of their rights under this subsection. Section 413.031(c) provides that in resolving disputes over the amount of payment due for services determined to be medically necessary and appropriate for treatment of a compensable injury, the role of the Division is to adjudicate the payment given the relevant statutory provisions and commissioner rules. Section 413.031(e) provides that except as provided by subsections (d), (f), and (m), a review of the medical necessity of a health care service provided under this chapter or Chapter 408 shall be conducted by an independent review organization under Insurance Code Article 21.58C in the same manner as reviews of utilization review decisions by health maintenance organizations. Section 413.031(g) provides that in performing a review of medical necessity under Subsection (d) or (e), an independent review organization may request that the commissioner order an examination by a designated doctor under Chapter 408. Section 413.032(a) provides that an IRO that conducts a review under Chapter 413 shall specify the minimum elements on which the IRO decision is based. Section 413.0511(b)(8) authorizes the Division's medical advisor to monitor the quality and timeliness of decisions made by designated doctors and independent review organizations, and the imposition of sanctions regarding those decisions. Section 413.0512(c) authorizes the Division's medical quality review panel to recommend to the medical advisor appropriate action regarding utilization review agents, and independent review organizations, and the addition and deletion of doctors from the list of approved doctors under §408.023 or the list of designated doctors established under §408.1225. Insurance Code Article 21.58A, §13 grants the commissioner of workers' compensation the authority to adopt rules as necessary to implement Article 21.58A, as this section applies to utilization review of health care services provided to persons eligible for workers' compensation medical benefits under Labor Code Title 5. Government Code §2001.177(a) provides that a state agency by rule may require a party who appeals a final decision in a contested case to pay all or a part of the cost of preparation of the original or a certified copy of the record of the agency proceeding that is required to be sent to the reviewing court. Labor Code §402.00111 provides that the commissioner of workers' compensation shall exercise all executive authority, including rulemaking authority, under the Labor Code and other laws of this state. Section 402.061 provides that the commissioner of workers' compensation has the authority to adopt rules as necessary to implement and enforce the Texas Workers' Compensation Act.

§133.305. MDR--General.

(a) Definitions. The following words and terms, when used in this subchapter, shall have the following meanings unless the context clearly indicates otherwise.

(1) Adverse determination--A determination by a utilization review agent that the health care services furnished or proposed to be furnished to a patient are not medically necessary, as defined in Insurance Code Article 21.58A (§4201.002 effective April 1, 2007).

(2) Life-threatening--A disease or condition for which the likelihood of death is probable unless the course of the disease or condition is interrupted, as defined in Insurance Code Article 21.58A, §2(12) (§4201.002 effective April 1, 2007).

(3) Medical dispute resolution (MDR)--A process for resolution of one or more of the following disputes:

(A) a medical fee dispute; or

(B) a medical necessity dispute, which may be:

(i) a preauthorization or concurrent medical necessity dispute; or

(ii) a retrospective medical necessity dispute.

(4) Medical fee dispute--A dispute that involves an amount of payment for non-network health care rendered to an injured employee (employee) that has been determined to be medically necessary and appropriate for treatment of that employee's compensable injury. The dispute is resolved by the Division pursuant to Division rules, including §133.307 of this subchapter (relating to MDR of Fee Disputes). The following types of disputes can be a medical fee dispute:

(A) a health care provider (provider), or a qualified pharmacy processing agent, as described in Labor Code §413.0111, dispute of an insurance carrier (carrier) reduction or denial of a medical bill;

(B) an employee dispute of reduction or denial of a refund request for health care charges paid by the employee; and

(C) a provider dispute regarding the results of a Division or carrier audit or review which requires the provider to refund an amount for health care services previously paid by the carrier.

(5) Network health care--Health care delivered or arranged by a certified workers' compensation health care network, including authorized out-of-network care, as defined in Insurance Code Chapter 1305 and related rules.

(6) Non-network health care--Health care not delivered or arranged by a certified workers' compensation health care network as defined in Insurance Code Chapter 1305 and related rules.

(7) Preauthorization or concurrent medical necessity disputes--A dispute that involves a review of adverse determination of network or non-network health care requiring preauthorization or concurrent review. The dispute is reviewed by an independent review organization (IRO) pursuant to the Insurance Code, the Labor Code and related rules, including §133.308 of this subchapter (relating to MDR by Independent Review Organizations).

(8) Retrospective medical necessity dispute--A dispute that involves a review of the medical necessity of health care already provided. The dispute is reviewed by an IRO pursuant to the Insurance Code, Labor Code and related rules, including §133.308 of this subchapter.

(b) Dispute Sequence. If a dispute regarding compensability, extent of injury, liability, or medical necessity exists for the same service for which there is a medical fee dispute, the disputes regarding compensability, extent of injury, liability, or medical necessity shall be resolved prior to the submission of a medical fee dispute for the same services in accordance with Labor Code §413.031 and §408.021.

(c) Division Administrative Fee. The Division may assess a fee, as published on the Division's website, in accordance with Labor Code §413.020 when resolving disputes pursuant to §133.307 and §133.308 of this subchapter if the decision indicates the following:

(1) the provider billed an amount in conflict with Division rules, including billing rules, fee guidelines or treatment guidelines;

(2) the carrier denied or reduced payment in conflict with Division rules, including reimbursement or audit rules, fee guidelines or treatment guidelines;

(3) the carrier has reduced the payment based on a contracted discount rate with the provider but has not made the contract available upon the Division's request;

(4) the carrier has reduced or denied payment based on a contract that indicates the direction or management of health care through a provider arrangement that has not been certified as a workers' compensation network, in accordance with Insurance Code Chapter 1305; or

(5) the carrier or provider did not comply with a provision of the Insurance Code, Labor Code or related rules.

(d) Confidentiality. Any documentation exchanged by the parties during MDR that contains information regarding a patient other than the employee for that claim must be redacted by the party submitting the documentation to remove any information that identifies that patient.

(e) Severability. If a court of competent jurisdiction holds that any provision of §§133.305, 133.307, and 133.308 of this subchapter are inconsistent with any statutes of this state, are unconstitutional, or are invalid for any reason, the remaining provisions of these sections shall remain in full effect.

§133.307. MDR of Fee Disputes.

(a) Applicability. This section applies to a request for medical fee dispute resolution for non-network or certain authorized out-of-network health care not subject to a contract, which was filed on or after January 15, 2007. Dispute resolution requests filed prior to January 15, 2007 shall be resolved in accordance with the rules in effect at the time the request was filed. In resolving non-network disputes which are over the amount of payment due for health care determined to be medically necessary and appropriate for treatment of a compensable injury, the role of the Division of Workers' Compensation (Division) is to adjudicate the payment, given the relevant statutory provisions and Division rules.

(b) Requestors. The following parties may be requestors in medical fee disputes:

(1) the health care provider (provider), or a qualified pharmacy processing agent, as described in Labor Code §413.0111, in a dispute over the reimbursement of a medical bill(s);

(2) the provider in a dispute about the results of a Division or carrier audit or review which requires the provider to refund an amount for health care services previously paid by the insurance carrier;

(3) the injured employee (employee) in a dispute involving an employee's request for reimbursement from the carrier of medical expenses paid by the employee; or

(4) the employee when requesting a refund of the amount the employee paid to the provider in excess of a Division fee guideline.

(c) Requests. Requests for medical dispute resolution (MDR) shall be filed in the form and manner prescribed by the Division. Requestors shall file two legible copies of the request with the Division.

(1) Timeliness. A requestor shall timely file with the Division's MDR Section or waive the right to MDR. The Division shall

deem a request to be filed on the date the MDR Section receives the request.

(A) A request for medical fee dispute resolution that does not involve issues identified in subparagraph (B) of this paragraph shall be filed no later than one year after the date(s) of service in dispute.

(B) A request may be filed later than one year after the dates(s) of service if:

(i) a related compensability, extent of injury, or liability dispute under Labor Code Chapter 410 has been filed, the medical fee dispute shall be filed not later than 60 days after the date the requestor receives the final decision, inclusive of all appeals, on compensability, extent of injury, or liability;

(ii) a medical dispute regarding medical necessity has been filed, the medical fee dispute must be filed not later than 60 days after the date the requestor received the final decision on medical necessity, inclusive of all appeals, related to the health care in dispute and for which the carrier previously denied payment based on medical necessity; or

(iii) the dispute relates to a refund notice issued pursuant to a Division audit or review, the medical fee dispute must be filed not later than 60 days after the date of the receipt of a refund notice.

(2) Provider Request. The provider shall complete the required sections of the request in the form and manner prescribed by the Division. The provider shall file the request with the MDR Section by any mail service or personal delivery. The request shall include:

(A) a copy of all medical bill(s) as originally submitted to the carrier and a copy of all medical bill(s) submitted to the carrier for reconsideration in accordance with §133.250 of this chapter (relating to Reconsideration for Payment of Medical Bills);

(B) a copy of each explanation of benefits (EOB) relevant to the fee dispute or, if no EOB was received, convincing documentation providing evidence of carrier receipt of the request for an EOB;

(C) the form DWC-60 table listing the specific disputed health care and charges in the form and manner prescribed by the Division;

(D) when applicable, a copy of the final decision regarding compensability, extent of injury, liability and/or medical necessity for the health care related to the dispute;

(E) a copy of all applicable medical records specific to the dates of service in dispute;

(F) a position statement of the disputed issue(s) that shall include:

(i) a description of the health care for which payment is in dispute,

(ii) the requestor's reasoning for why the disputed fees should be paid or refunded,

(iii) how the Labor Code, Division rules, and fee guidelines impact the disputed fee issues, and

(iv) how the submitted documentation supports the requestor position for each disputed fee issue;

(G) documentation that discusses, demonstrates, and justifies that the payment amount being sought is a fair and reasonable rate of reimbursement in accordance with §134.1 of this title (relating to Medical Reimbursement) when the dispute involves health care for which the Division has not established a maximum allowable reimbursement (MAR), as applicable; and

(H) if the requestor is a pharmacy processing agent, a signed and dated copy of an agreement between the processing agent and the pharmacy clearly demonstrating the dates of service covered by the contract and a clear assignment of the pharmacy's right to participate in the MDR process. The pharmacy processing agent may redact any proprietary information contained within the agreement.

(3) Employee Dispute Request. An employee who has paid for health care may request medical fee dispute resolution of a refund or reimbursement request that has been denied. The employee's dispute request shall be sent to the MDR Section by mail service, personal delivery or facsimile and shall include:

(A) the form DWC-60 table listing the specific disputed health care in the form and manner prescribed by the Division;

(B) an explanation of the disputed amount that includes a description of the health care, why the disputed amount should be refunded or reimbursed, and how the submitted documentation supports the explanation for each disputed amount;

(C) proof of employee payment (copies of receipts);

(D) a copy of the carrier's or health care provider's denial of reimbursement or refund relevant to the dispute, or, if no denial was received, convincing evidence of the employee's attempt to obtain reimbursement or refund from the carrier or health care provider;

(4) Division Response to Request. The Division will forward a copy of the request and the documentation submitted in accordance with paragraph (2) or (3) of this subsection to the respondent. The respondent shall be deemed to have received the request on the acknowledgement date as defined in §102.5 of this title (relating to General Rules for Written Communications to and from the Commission).

(d) Responses. Carrier or provider responses to a request for MDR shall be legible and submitted in the form and manner prescribed by the Division.

(1) Timeliness. The response will be deemed timely if received by the Division via mail service, personal delivery, or facsimile within 14 calendar days after the date the respondent received the copy of the requestor's dispute. If the Division does not receive the response information within 14 calendar days of the dispute notification, then the Division may base its decision on the available information.

(2) Carrier Response. Upon receipt of the request, the carrier shall complete the required sections of the request form and provide any missing information not provided by the requestor and known to the carrier.

(A) The response to the request shall include the completed request form and:

(i) all initial and reconsideration EOBs related to the health care in dispute not submitted by the requestor or a statement certifying that the carrier did not receive the provider's disputed billing prior to the dispute request;

(ii) a copy of all medical bill(s) relevant to the dispute, if different from that originally submitted to the carrier for reimbursement;

(iii) a copy of any pertinent medical records or other documents relevant to the fee dispute not already provided by the requestor;

(iv) a statement of the disputed fee issue(s), which includes:

(I) a description of the health care in dispute;

(II) a position statement of reasons why the disputed medical fees should not be paid;

(III) a discussion of how the Labor Code and Division rules, including fee guidelines, impact the disputed fee issues; and

(IV) a discussion regarding how the submitted documentation supports the respondent's position for each disputed fee issue; and

(V) documentation that discusses, demonstrates, and justifies that the amount the respondent paid is a fair and reasonable reimbursement in accordance with Labor Code §413.011 and §134.1 of this title if the dispute involves health care for which the Division has not established a MAR, as applicable.

(B) The response shall address only those denial reasons presented to the requestor prior to the date the request for MDR was filed with the Division and the other party. Any new denial reasons or defenses raised shall not be considered in the review. If the response includes unresolved issues of compensability, extent of injury, liability, or medical necessity, the request for MDR will be dismissed in accordance with subsection (e)(3)(G) or (H) of this section.

(C) If the carrier did not receive the provider's disputed billing or the employee's reimbursement request relevant to the dispute prior to the request, the carrier shall include that information in a written statement in the response the carrier submits to the Division.

(D) If the medical fee dispute involves compensability, extent of injury, or liability, the carrier shall attach a copy of any related Plain Language Notice in accordance with §124.2 of this title (relating to Carrier Reporting and Notification Requirements).

(E) If the medical fee dispute involves medical necessity issues, the carrier shall attach a copy of documentation that supports an adverse determination in accordance with §19.2005 of this title (relating to General Standards of Utilization Review).

(3) Provider Response. Upon receipt of the request, the provider shall complete the required sections of the request form and provide any missing information not provided by the requestor and known to the provider. The response shall include:

(A) any documentation, including medical bills and employee payment receipts, supporting the reasons why the refund request was denied;

(B) a statement of the disputed fee issue(s), which includes a discussion regarding how the submitted documentation supports the provider's position for each disputed fee issue; and

(C) a copy of the provider's refund payment, if applicable.

(e) MDR Action. The Division will review the completed request and response to determine appropriate MDR action.

(1) Request for Additional Information. The Division may request additional information from either party to review the medical fee issues in dispute. The additional information must be received by the Division no later than 14 days after receipt of this request. If the Division does not receive the requested additional information within 14 days after receipt of the request, then the Division may base its decision on the information available. The Division shall forward any additional information received to the parties.

(2) Issues Raised by the Division. The Division may raise issues in the MDR process when it determines such an action to be appropriate to administer the dispute process consistent with the provisions of the Labor Code and Division rules.

(3) Dismissal. The Division may dismiss a request for medical fee dispute resolution if:

(A) the requestor informs the Division, or the Division otherwise determines, that the dispute no longer exists;

(B) the requestor is not a proper party to the dispute pursuant to subsection (b) of this section;

(C) the Division determines that the medical bills in the dispute have not been submitted to the carrier for reconsideration;

(D) the fee disputes for the date(s) of health care in question have been previously adjudicated by the Division;

(E) the request for medical fee dispute resolution is untimely;

(F) the Division determines the medical fee dispute is for health care services provided pursuant to a private contractual fee arrangement;

(G) the request contains an unresolved adverse determination of medical necessity, the Division shall notify the parties of the review requirements pursuant to §133.308 of this subchapter (relating to MDR by Independent Review Organizations) and will dismiss the request in accordance with the process outlined in §133.305 of this subchapter (relating to MDR--General);

(H) the carrier has raised a dispute pertaining to compensability, extent of injury, or liability for the claim, the Division shall notify the parties of the review requirements pursuant to §124.2 of this title, and will dismiss the request until those disputes have been resolved by a final decision, inclusive of all appeals;

(I) the request for medical fee dispute resolution was not submitted in compliance with the provisions of the Labor Code and this chapter; or

(J) the Division determines that good cause exists to dismiss the request.

(4) Decision. The Division shall send a decision to the disputing parties and to representatives of record for the parties and post the decision on the Department Internet website.

(5) Division Fee. The Division may assess a fee in accordance with §133.305 of this subchapter.

(f) Appeal. A party to a medical fee dispute may seek judicial review of the decision by filing a petition in a Travis County district court not later than the 30th day after the date on which the decision is received by the appealing party. The parties will be deemed to have received the decision on the acknowledgement date as defined in §102.5 of this title. Any decision that is not timely appealed becomes final. If a party to a medical fee dispute files a petition for judicial review of the MDR Section decision, the party shall, at the time the petition is filed with the district court, send a copy of the petition for judicial review to the Division. The Division and the Department are not considered to be parties to the medical dispute pursuant to Labor Code §413.031(k). The following information must be included in the petition or provided by cover letter:

(1) the MDR Section tracking number for the dispute being appealed;

(2) the names of the parties;

(3) the cause number;

(4) the identity of the court; and

(5) the date the petition was filed with the court.

(g) Record for Appeal. The Division shall upon receipt of the court petition prepare a record of the MDR Section review and submit a copy of the record to the district court. The Division shall assess the party seeking judicial review expenses incurred by the Division in preparing and copying the record. The record shall contain:

(1) the MDR Section decision;

(2) the request for MDR;

(3) all documentation and written information submitted by the requestor;

(4) all documentation and written information submitted by the respondent;

(5) other documents contained in the MDR Section files (e.g. correspondence, orders for production);

(6) copies of any pertinent medical literature or other documentation utilized to support the decision or, where such documentation is subject to copyright protection or is voluminous, then a listing of such documentation referencing the portion(s) of each document utilized;

(7) if not specified in the decision, citations to the particular provisions in statutes, rules, and other authorities that are utilized to support the decision; and

(8) signed and certified custodian of records affidavit;

(h) Letter of Clerical Correction. Upon receipt of a Division decision, either party may request a clerical correction of an error in a decision. Clerical errors are non-substantive and include but are not limited to typographical or mathematical calculation errors. Only the Division can determine if a clerical correction is required. A request for clerical correction does not alter the deadlines for appeal.

§133.308. MDR by Independent Review Organizations.

(a) Applicability. This section applies to the independent review of network and non-network preauthorization, concurrent or retrospective medical necessity disputes for a dispute resolution request filed on or after January 15, 2007. Dispute resolution requests filed prior to January 15, 2007 shall be resolved in accordance with the rules in effect at the time the request was filed. When applicable, retrospective medical necessity disputes shall be governed by the provisions of Labor Code §413.031(n) and related rules. All independent review organizations (IROs) performing reviews of health care under the Labor Code and Insurance Code, regardless of where the independent review activities are located, shall comply with this section. The Insurance Code, the Labor Code and related rules govern the independent review process.

(b) IRO Certification. Each IRO performing independent review of health care provided in the workers' compensation system shall be certified pursuant to Insurance Code Article 21.58C (Chapter 4202 effective April 1, 2007).

(c) Conflicts. Conflicts of interest will be reviewed by the Department consistent with the provisions of the Insurance Code Article 21.58C, §2(f) (§4202.008 effective April 1, 2007), Labor Code §413.032(b), §12.203 of this title (relating to Conflicts of Interest Prohibited), and any other related rules. Notification of each IRO decision must include a certification by the IRO that the reviewing provider has certified that no known conflicts of interest exist between that provider, the employee, any of the treating providers, or any of the providers who reviewed the case for determination prior to referral to the IRO.

(d) Monitoring. The Division will monitor IROs under Labor Code §§413.002, 413.0511, and 413.0512. The Division shall report the results of the monitoring of IROs to the Department on at least a quarterly basis.

(e) Requestors. The following parties are considered requestors

(1) In network disputes:

(A) providers, or qualified pharmacy processing agents acting on behalf of a pharmacy, as described in Labor Code §413.0111, for preauthorization, concurrent, and retrospective medical necessity dispute resolution; and

(B) employees for preauthorization, concurrent, and retrospective medical necessity dispute resolution.

(2) In non-network disputes:

(A) providers, or qualified pharmacy processing agents acting on behalf of a pharmacy, as described in Labor Code §413.0111, for preauthorization, concurrent, and retrospective medical necessity dispute resolution; and

(B) employees for preauthorization and concurrent medical necessity dispute resolution; and, for retrospective medical necessity dispute resolution when reimbursement was denied for health care paid by the employee.

(f) Requests. A request for independent review must be filed in the form and manner prescribed by the Department. The Department's IRO request form may be obtained from:

(1) the Department's Internet website at www.tdi.state.tx.us; or

(2) the Health and Worker's Compensation Network Certification and Quality Assurance Division, Mail Code 103-6A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104.

(g) Timeliness. A requestor shall file a request for independent review with the insurance carrier (carrier) or the carrier's utilization review agent (URA) no later than the 45th calendar day after receipt of the denial of reconsideration. The carrier shall immediately notify the Department upon receipt of the request for an independent review. In a preauthorization or concurrent review dispute request, an employee with a life-threatening condition, as defined in §133.305 of this subchapter (relating to MDR--General), is entitled to an immediate review by an IRO and is not required to comply with the procedures for a reconsideration.

(h) Dismissal. The Department may dismiss a request for medical necessity dispute resolution if:

(1) the requestor informs the Department, or the Department otherwise determines, that the dispute no longer exists;

(2) the individual or entity requesting medical necessity dispute resolution is not a proper party to the dispute;

(3) the Department determines that the dispute involving a non-life-threatening condition has not been submitted to the carrier for reconsideration;

(4) the Department has previously resolved the dispute for the date(s) of health care in question;

(5) the request for dispute resolution is untimely pursuant to subsection (g) of this section;

(6) the request for medical necessity dispute resolution was not submitted in compliance with the provisions of this subchapter; or

(7) the Department determines that good cause otherwise exists to dismiss the request.

(i) IRO Assignment and Notification. The Department shall review the request for IRO review, assign an IRO, and notify the parties about the IRO assignment consistent with the provisions of Insurance Code Article 21.58C, §2(a)(1)(A) (§4202.002(a)(1) effective April 1, 2007), §1305.355(a), Chapter 12, Subchapter F of this title (related to Random Assignment of Independent Review Organizations), any other related rules, and this subchapter.

(j) Carrier Document Submission. The carrier or the carrier's URA shall submit the documentation required in paragraphs (1) - (6) of this subsection to the IRO not later than the third working day after the date the carrier receives the notice of IRO assignment. The documentation shall include:

(1) the forms prescribed by the Department for requesting IRO review;

(2) all medical records of the employee in the possession of the carrier that are relevant to the review;

(3) all documents, guidelines, policies, protocols and criteria used by the carrier in making the decision;

(4) all documentation and written information submitted to the carrier in support of the appeal;

(5) the written notification of the initial adverse determination and the written adverse determination of the reconsideration; and

(6) any other information required by the Department related to a request from a carrier for the assignment of an IRO.

(k) Additional Information. The IRO shall request additional necessary information from either party or from other providers whose records are relevant to the review.

(1) The party or providers with relevant records shall deliver the requested information to the IRO as directed by the IRO. If the provider requested to submit records is not a party to the dispute, the carrier shall reimburse copy expenses for the requested records pursuant to §134.120 of this title (relating to Reimbursement for Medical Documentation). Parties to the dispute may not be reimbursed for copies of records sent to the IRO.

(2) If the required documentation has not been received as requested by the IRO, the IRO shall notify the Department and the Department shall request the necessary documentation.

(3) Failure to provide the requested documentation as directed by the IRO or Department may result in enforcement action as authorized by statutes and rules.

(l) Designated Doctor Exam. In performing a review of medical necessity, an IRO may request that the Division require an examination by a designated doctor and direct the employee to attend the examination pursuant to Labor Code §413.031(g) and §408.0041. The IRO request to the Division must be made no later than 10 days after the IRO receives notification of assignment of the IRO. The treating doctor and carrier shall forward a copy of all medical records, diagnostic reports, films, and other medical documents to the designated doctor appointed by the Division, to arrive no later than three working days prior to the scheduled examination. Communication with the designated doctor is prohibited regarding issues not related to the medical necessity dispute. The designated doctor shall complete a report and file it with the IRO, on the form and in the manner prescribed by the Division no later than seven working days after completing the examination. The designated doctor report shall address all issues as directed by the Division.

(m) Time Frame for IRO Decision. The IRO will render a decision as follows:

(1) for life-threatening conditions, no later than eight days after the IRO receipt of the dispute;

(2) for preauthorization and concurrent medical necessity disputes, no later than the 20th day after the IRO receipt of the dispute;

(3) for retrospective medical necessity disputes, no later than the 30th day after the IRO receipt of the IRO fee; and

(4) if a designated doctor examination has been requested by the IRO, the above time frames begin on the date of the IRO receipt of the designated doctor report.

(n) IRO Decision. The decision shall be mailed or otherwise transmitted to the parties and to representatives of record for the parties and transmitted in the form and manner prescribed by the Department within the time frames specified in this section.

(1) The IRO decision must include:

(A) a list of all medical records and other documents reviewed by the IRO, including the dates of those documents;

(B) a description and the source of the screening criteria or clinical basis used in making the decision;

(C) an analysis of, and explanation for, the decision, including the findings and conclusions used to support the decision;

(D) a description of the qualifications of each physician or other health care provider who reviewed the decision;

(E) a statement that clearly states whether or not medical necessity exists for each of the health care services in dispute;

(F) a certification by the IRO that the reviewing provider has no known conflicts of interest pursuant to the Insurance Code Article 21.58A (Chapter 4201 effective April 1, 2007), Labor Code §413.032, and §12.203 of this title; and

(G) if the IRO's decision is contrary to:

(i) the Division's policies or guidelines adopted under Labor Code §413.011, the IRO must indicate in the decision the specific basis for its divergence in the review of medical necessity of non-network health care; or

(ii) the network's treatment guidelines, the IRO must indicate in the decision the specific basis for its divergence in the review of medical necessity of network health care.

(2) The notification to the Department shall also include certification of the date and means by which the decision was sent to the parties.

(o) Carrier Use of Peer Review Report after an IRO Decision. If an IRO decision determines that medical necessity exists for health care that the carrier denied and the carrier utilized a peer review report on which to base its denial, the peer review report shall not be used for subsequent medical necessity denials of the same health care services subsequently reviewed for that compensable injury.

(p) IRO Fees. IRO fees will be paid in the same amounts as the IRO fees set by Department rules. In addition to the specialty classifications established as tier two fees in Department rules, independent review by a doctor of chiropractic shall be paid the tier two fee. IRO fees shall be paid as follows:

(1) In network disputes, a preauthorization, concurrent, or retrospective medical necessity dispute for health care provided by a

network, the carrier must remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO;

(2) In non-network disputes, IRO fees for disputes regarding nonnetwork health care must be paid as follows:

(A) in a preauthorization or concurrent review medical necessity dispute or an employee reimbursement dispute, the carrier shall remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO.

(B) in a retrospective medical necessity dispute, the requestor must remit payment to the assigned IRO within 15 days after receipt of an invoice from the IRO.

(i) if the IRO fee has not been received within 15 days of the requestor's receipt of the invoice, the IRO shall notify the Department and the Department shall dismiss the dispute with prejudice.

(ii) after an IRO decision is rendered, the IRO fee must be paid or refunded by the nonprevailing party as determined by the IRO in its decision.

(3) Designated doctor examinations requested by an IRO shall be paid by the carrier in accordance with the medical fee guidelines under the Labor Code and related rules.

(4) Failure to pay or refund the IRO fee may result in enforcement action as authorized by statute and rules and removal from the Division's Approved Doctor List.

(5) For health care not provided by a network, the non-prevailing party to a retrospective medical necessity dispute must pay or refund the IRO fee to the prevailing party upon receipt of the IRO decision, but not later than 15 days regardless of whether an appeal of the IRO decision has been or will be filed.

(6) The IRO fees may include an amended notification of decision if the Department determines the notification to be incomplete. The amended notification of decision shall be filed with the Department no later than five working days from the IRO's receipt of such notice from the Department. The amended notification of decision does not alter the deadlines for appeal.

(7) If a requestor withdraws the request for an IRO decision after the IRO has been assigned by the Department but before the IRO sends the case to an IRO reviewer, the requestor shall pay the IRO a withdrawal fee of $150 within 30 days of the withdrawal. If a requestor withdraws the request for an IRO decision after the case is sent to a reviewer, the requestor shall pay the IRO the full IRO review fee within 30 days of the withdrawal.

(8) In addition to Department enforcement action, the Division may assess an administrative fee in accordance with Labor Code §413.020 and §133.305 of this subchapter.

(q) Defense. A carrier may claim a defense to a medical necessity dispute if the carrier timely complies with the IRO decision with respect to the medical necessity or appropriateness of health care for an employee. Upon receipt of an IRO decision for a retrospective medical necessity dispute that finds that medical necessity exists, the carrier must review, audit and process the bill. In addition, the carrier shall tender payment consistent with the IRO decision, and issue a new explanation of benefits (EOB) to reflect the payment within 21 days upon receipt of the IRO decision.

(r) Appeal. A decision issued by an IRO is not considered an agency decision and neither the Department nor the Division are considered parties to an appeal. Appeals of IRO decisions will be as follows:

(1) Non-Network Appeal Procedures. A carrier shall comply with the IRO decision in accordance with Labor Code §413.031(m). A party to a medical necessity dispute may seek judicial review of the IRO decision by filing a petition in a Travis County district court not later than the 30th day after the date on which the decision is received by the appealing party. The parties will be deemed to have received the decision on the acknowledgement date as defined in §102.5 of this title (relating to General Rules for Written Communications to and from the Commission). Any decision that is not timely appealed becomes final. A party to a medical necessity dispute who appeals the decision shall, at the time the petition is filed, send a copy of the petition for judicial review to the IRO that issued the decision being appealed, and request that the IRO provide a record for the appeal. The party requesting the record shall pay the IRO copying costs for the records.

(2) Record for Non-Network Appeal. If a party to a medical necessity dispute files a petition for judicial review of the IRO decision, the IRO, upon request, shall provide a record of the review and submit it to the requestor within 15 days of the request. The record shall include the following documents that are in the possession of the IRO and which were reviewed by the IRO in making the decision including:

(A) medical records;

(B) all documents used by the carrier in making the decision that resulted in the adverse determination under review by the IRO;

(C) all documentation and written information submitted by the carrier to the IRO in support of the review;

(D) the written notification of the adverse determination and the written determination of the reconsideration;

(E) a list containing the name, address and phone number of each provider who provided medical records to the IRO relevant to the review;

(F) a list of all medical records or other documents reviewed by the IRO, including the dates of those documents;

(G) a copy of the decision that was sent to all parties;

(H) copies of any pertinent medical literature or other documentation (such as any treatment guideline or screening criteria) utilized to support the decision or, where such documentation is subject to copyright protection or is voluminous, then a listing of such documentation referencing the portion(s) of each document utilized;

(I) a signed and certified custodian of records affidavit; and

(J) other information that was required by the Department related to a request from a carrier or the carrier's URA for the assignment of the IRO.

(3) Network Appeal Procedures. A party to a medical necessity dispute may seek judicial review of the decision as provided in Insurance Code §1305.355.

(s) Non-Network Spinal Surgery Appeal. A party to a preauthorization or concurrent medical necessity dispute regarding spinal surgery may appeal the IRO decision in accordance with Labor Code §413.031(l) by requesting a Contested Case Hearing (CCH).

(1) The written appeal must be filed with the Division Chief Clerk no later than 10 days after receipt of the IRO decision and must be filed in compliance with §142.5(c) of this title (relating to Sequence of Proceedings to Resolve Benefit Disputes).

(2) The CCH must be scheduled and held not later than 20 days after Division receipt of the request for a CCH.

(3) The hearing and further appeals shall be conducted in accordance with Chapters 140, 142, and 143 of this title (relating to Dispute Resolution/General Provisions, Benefit Contested Case Hearing, and Review by the Appeals Panel).

(4) The party appealing the IRO decision shall deliver a copy of its written request for a hearing to all other parties involved in the dispute. The IRO is not required to participate in the CCH or any appeal.

(t) Medical Fee Dispute Request. If the health care provider has an unresolved fee dispute related to health care that was found medically necessary, after the final decision of the medical necessity dispute, the provider may file a medical fee dispute in accordance with §133.305 and §133.307 of this subchapter (relating to MDR of Fee Disputes).

(u) Enforcement. If the Department believes that any person is in violation of the Labor Code, Insurance Code and related rules, the Department may initiate an enforcement action. Nothing in this section modifies or limits the authority of the Department or the Division.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 11, 2006.

TRD-200606593
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Effective date: December 31, 2006
Proposal publication date: June 23, 2006
For further information, please call: (512) 804-4288

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 1. GENERAL LAND OFFICE

CHAPTER 3. GENERAL PROVISIONS

SUBCHAPTER C. SERVICES AND PRODUCTS

31 TAC §3.31

The Texas General Land Office (GLO) adopts amendments to §3.31, relating to Fees. The adopted amendments are designed to address the cost recovery of requests for digitized archival material.

The amendments are adopted without changes to the proposed text published in the October 27, 2006, issue of the *Texas Register* (31 TexReg 8826) and will not be republished. The GLO recently organized all the fees and costs the agency charges under 31 TAC, Part 1, Chapter 3. The GLO organized the fees and costs under one rule in order to facilitate the public's use of the agency rules, and the public's understanding of the fees and costs associated with doing business with the GLO. Upon review of its rules, the GLO found that there were no fees to recover requests for digitized archival material to be distributed via digital format, a requirement under the Texas Public Information Act. The adopted amendments are designed to address the cost recovery of requests for this service. In a continued effort to maintain and organize its rules that facilitate the public's ease in access and use of its rules, the GLO adopts the amendments of 31 TAC §3.31(b)(4)(E).

No comments were received regarding any of the adopted amendments to Chapter 3.

The amendments are adopted under §§31.051, 31.064, 51.174 and 52.324 of the Texas Natural Resources Code, which provides the GLO with authorization to promulgate rules and to set and collect certain fees.

Texas Government Code, Chapter 552, and Texas Natural Resources Code, Chapters 31, 32, 33, 51 and 52 are affected by the adopted amendments.

Filed with the Office of the Secretary of State on December 4, 2006.

TRD-200606484
Trace Finley
Policy Director
General Land Office
Effective date: December 24, 2006
Proposal publication date: October 27, 2006
For further information, please call: (512) 475-1859

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PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.9

The Texas Parks and Wildlife Commission adopts an amendment to §53.9, concerning Falconry Permits, without changes to the proposed text as published in the September 29, 2006, issue of the *Texas Register* (31 TexReg 8191).

The amendment clarifies that the fee for a falconry permit will be prorated if the department opts to issue a falconry permit with an annual or two-year period of validity. Under the provisions of current §65.264, relating to Applications and Permits, the department may issue a falconry permit for any period of time up to three years. Because of difficulties in obtaining required reports in a timely fashion from some classes of falconers, the department has initiated a policy of issuing one-year permits to apprentice falconers. This has led to some confusion as to the fee amounts that must be paid for the initial permit and subsequent renewals. Under current §53.9, the fee for an apprentice permit is $60 and the fee for a renewal is also $60. It was not the department's intent to impose a $60 fee for issuance or renewal if the permit was issued for less than three years. Therefore, the amendment is necessary to make clear that the falconry permit fees established in §53.9 are to be prorated based on the period of validity of the permit.

The amendment will function by clearly delineating the fees to be paid for falconry permits.

The department received two comments opposing adoption of the proposed amendment. The comments and the agency's responses follow.

One commenter opposed adoption of the proposed amendment and stated that all fees should increase by $100 and that the raptor propagator permit should be increased to $500. The department disagrees with the comment and responds that the intent of the rulemaking is not to adjust fees. No changes were made as a result of the comment.

One commenter opposed adoption and stated that he should not have to pay for both a hunting licenses and a falconry permit because falconers take fewer resources than gun hunters. The department disagrees with the comment and responds that under Parks and Wildlife Code, Chapter 49, no person may take, capture, or possess, or attempt to take, capture, or possess a raptor in this state without a permit issued by the department. Under Chapter 42, no person may hunt any bird or animal in this state without acquiring a hunting license. Because these requirements are statutory, they cannot be modified or eliminated by rule. No changes were made as a result of the comment.

The department received 38 comments supporting adoption of the proposed rule.

The Texas Hawking Association commented in favor of adoption of the proposed amendment.

The amendment is adopted under Parks and Wildlife Code, §49.014, which authorizes the department to prescribe eligibility requirements and fees for any falconry, raptor propagation, or nonresident trapping permit.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2006.

TRD-200606502
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: December 25, 2006
Proposal publication date: September 29, 2006
For further information, please call: (512) 389-4775

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CHAPTER 57. FISHERIES
SUBCHAPTER A. HARMFUL OR POTENTIALLY HARMFUL EXOTIC FISH, SHELLFISH AND AQUATIC PLANTS

31 TAC §§57.114 - 57.124, 57.129 - 57.134, 57.136,

The Texas Parks and Wildlife Commission adopts amendments to §§57.114 - 57.124, 57.129 - 57.134 and 57.136, concerning Harmful or Potentially Harmful Exotic Fish, Shellfish and Aquatic Plants. Sections 57.114 - 57.121, 57.129, and 57.134 are adopted with changes to the proposed text as published in the July 21, 2006, issue of the *Texas Register* (31 TexReg 5762). Sections 57.122 - 57.124, 57.130 - 57.133 and 57.136 are adopted without changes and will not be republished.

The proposed rules published on July 21, 2006, included proposed amendments to §57.111, concerning Definitions and §57.113, concerning Exceptions. The proposed amendments to §57.111 and §57.113 are being withdrawn and reproposed elsewhere in this issue.

The change to §57.114, alters the title of the section to more accurately reflect its applicability and replaces the phrase "exotic shellfish" with the phrase "harmful or potentially harmful exotic shellfish".

The change to §57.115, alters the title of the section to more accurately reflect its applicability and replaces the phrase "exotic species" with the phrase "harmful or potentially harmful exotic species".

The change to §57.116, alters the title of the section to reflect the fact that the provisions of the section apply to the exotic species transport invoice, and eliminates initial capitalization in keeping with spare style.

The change to §57.117, eliminates an incorrect reference to the previous title of §57.114. The amendment to §57.114 changed the title from Health Certification of Exotic Shellfish, to Health Certification of Harmful or Potentially Harmful Exotic Shellfish.

The change to §57.118, eliminates an incorrect reference to the previous title of §57.117. The amendment to §57.117 changed the title from Exotic Species Permit: Fee and Application Requirements, to Exotic Species Permit: Application Requirements.

The change to §57.119, places an "and" between paragraphs (1) and (2) in subsection (e).

The change to §57.120, eliminates an incorrect reference to the previous title of §57.117. The amendment to §57.117 changed the title from Exotic Species Permit: Fee and Application Requirements, to Exotic Species Permit: Application Requirements.

The change to §57.121, corrects a reference to the title of §57.117. The amendment to §57.117 changed the title from Exotic Species Permit: Fee and Application Requirements, to Exotic Species Permit: Application Requirements.

The change §57.129, replaces the term "fish farm" with the term "aquaculture facility" to be consistent with terminology used throughout the subchapter.

The change to §57.134 eliminates the current reference to 30 TAC Chapter 321, Subchapter O, and replaces it with a general statement requiring compliance with Aquaculture General Permit issued by Texas Commission on Environmental Quality (TCEQ). The TCEQ permit supersedes the provisions of Chapter 321. The change also clarifies that the provisions of the section do not apply to aquaculture facilities raising only exotic plants.

Additionally, the department seeks to employ a standardized reference to the species subject to the provisions of the rule. In some instances, the rules refer to "exotic species" and in others, "harmful or potentially harmful fish, shellfish, and aquatic plants," and in others, "harmful or potentially harmful exotic species." All such terms refer to species subject to the provisions of the subchapter; however, the differences in these descriptors could cause confusion. The department therefore has determined that in the interests of clarity, all references in the subchapter should

be to "harmful or potentially harmful exotic species" and makes those changes accordingly.

The adverse effects of intentional and accidental introductions of exotic aquatic species into natural aquatic systems have been widely studied and documented around the world. The impact of a specific exotic species on a given native ecosystem is difficult to predict, but in general terms, the threat potential can be characterized by 1) evidence that the species is invasive elsewhere, 2) potential suitable range, 3) reproductive potential, 4) habitat quality, 5) the presence/absence of similar species, 6) the prey/predator relationship within the prospective habitat, and 7) food abundance. In addition, other factors, such as dispersal dynamics, can affect the efficacy of establishment. Once established, invasive exotic species are extremely difficult if not impossible to eliminate.

Based on empirical scientific evidence and the widely acknowledged threat that exotic species pose to native species and ecosystems, the department believes that the regulation of those fish, shellfish, and aquatic plants that pose demonstrable, potential, or unknown threats to native populations is an integral component of maintaining and protecting existing aquatic ecosystems. The species subject to restrictions by these rules have been selected because the department believes they are, could be, or can't be confidently excluded as threats to native ecosystems in Texas.

The amendments are necessary to correct errors, improve consistency and clarify certain provisions.

The amendment to §57.114, rewords the provisions of subsections (d), (e), (f)(2), (g), (h), (i) and (j) to conform terminology and to make the grammatical structure consistent. The amendment also clarifies the disease-testing process that must be followed by an aquaculture facility prior to the discharge of waste into or adjacent to public waters. Under current rules, a sample of shellfish must be tested for disease manifestation before a facility harvests or discharges waste "for the first time in a calendar year." The rules further require that the tests be performed within 14 days of harvest or discharge. In practice, harvest occurs once per year; however, some facilities could potentially complete more than one harvest cycle in a year, and some facilities periodically conduct water exchanges. Because the intent of the current rule is to ensure that exotic shellfish in a facility are tested and certified within 14 days before water is discharged, the department has determined that it is necessary to remove potential ambiguity from the current rule. Therefore, the amendment requires that disease testing take place no more than 14 days before any harvest or discharge occurs. The amendment is necessary to protect water resources and aquatic ecosystems.

The amendment to §57.115, conforms terminology and effects other nonsubstantive changes, such as implementing a consistent capitalization convention.

The amendment to §57.116, also conforms terminology and effects other nonsubstantive changes, such as implementing a consistent capitalization convention.

The amendment to §57.117, allows persons who wish to culture harmful or potentially harmful exotic aquatic plants to be eligible to apply for an exotic species permit. The amendment also conforms terminology to be consistent with other sections.

The amendments to §§57.118, 57.119, 57.120, and 57.121, also conform terminology to be consistent with other sections.

The amendment to §57.122, eliminates the reference to rules of practice and procedure of the department and requires that all appeals be conducted as provided by the State Office of Administrative Hearings. The amendment is necessary because the department repealed its rules of practice and procedure in 1996.

The amendments to §§57.123, 57.124, 57.129, 57.130, 57.131, 57.132, and 57.134, conform terminology as necessary to be consistent with other sections.

The amendment to §57.136, adds a reference to penalties prescribed under the Agriculture Code. The proposed amendment is necessary to include the department's authority to impose penalties under the Agriculture Code for certain violations related to possession, propagation, sale or release of harmful or potentially harmful exotic species by an aquaculturist.

The department received three comments concerning adoption of the proposed rules. None of the commenters opposed adoption of the rules; however, each commenter made suggestions to improve them. Those comments, and the agency's response, are as follows.

One commenter stated that the department should consider allowing the sale of applesnails that are packed and frozen outside of the country and shipped to food markets in Texas. The department disagrees that the possession and sale of frozen applesnails should be addressed in this rulemaking, since the subject was not addressed in the proposed rule. However, the department agrees that further investigation is warranted and intends to do so. No changes were made as a result of the comment.

One commenter stated that changing the term "fish farm" to "aquaculture facility" could cause problems with property tax farm and ranch appraisal laws and with local municipalities that support farmers but might not accept aquaculture as farming if it is not called farming. The commenter also stated that the change in terminology might cause problems with insurance companies as to how to classify "aquaculturists" that don't have a farm or a ranch. The department disagrees with the comments and responds that Agriculture Code, §134.001(4) explicitly defines the terms "aquaculture" and "fish farming" as agricultural activities and uses the terms interchangeably. No changes were made as a result of the comments.

Except for the comments noted earlier, the department received no other comments supporting or opposing adoption of the proposed rules.

The amendments are adopted under the authority of Parks and Wildlife Code, §66.007, which authorizes the commission to regulate the importation, possession, sale, and placing into the water of this state harmful or potentially harmful exotic fish, shellfish and aquatic plants, and under Agriculture Code, §134.020, which authorizes the commission to regulate the importation, propagation, and sale of harmful or potentially harmful exotic species by an aquaculturist.

§57.114. Health Certification of Harmful or Potentially Harmful Exotic Shellfish.

(a) All disease free certification of harmful or potentially harmful exotic shellfish must be conducted by a shellfish disease specialist approved by the department.

(b) Any person importing live harmful or potentially harmful exotic shellfish from facilities outside the state must prior to importation:

(1) provide documentation to the department that the harmful or potentially harmful exotic shellfish to be imported have been inspected and certified as disease-free by a department-approved shellfish disease specialist; and

(2) receive acknowledgment from the department that the requirements of paragraph (1) of this subsection have been met.

(c) Any person in possession of harmful or potentially harmful exotic shellfish for the purpose of production of post-larvae must provide to the department monthly certification that nauplii and post-larvae have been examined and are certified to be disease-free. If certification cannot be provided, the harmful or potentially harmful exotic shellfish must be maintained in quarantine condition until the department acknowledges in writing that the stock is disease-free or specifies in writing condition(s) under which the quarantine can be removed.

(d) Any person in possession of harmful or potentially harmful exotic shellfish stocks who observes one or more of the manifestations of disease appearing on the clinical analysis checklist provided by the department shall:

(1) immediately place the entire facility under quarantine condition, immediately notify the department and immediately request an inspection from a certified inspector; or

(2) immediately place the entire facility under quarantine condition, immediately notify the department and immediately submit samples of the affected harmful or potentially harmful exotic shellfish to a department approved shellfish disease specialist for analysis. Results of such analyses shall be forwarded to the department immediately upon receipt.

(e) Upon receiving a request from a permit holder under subsection (d)(1) of this section, the certified inspector shall inspect the private facility, complete the clinical analysis checklist provided by the department, and submit copies of the checklist to the department and the permit holder.

(f) No more than 14 days prior to harvesting ponds or discharging any waste into or adjacent to water in the state, the permittee shall:

(1) have a certified inspector visit the facility and examine samples of the shellfish from each pond or other structure from which waste will be discharged or from which harmful or potentially harmful exotic shellfish will be harvested or from any other pond or structure that in the opinion of the certified inspector requires further investigation and shall submit the results of the examination to the department on the clinical analysis checklist; or

(2) submit samples of the harmful or potentially harmful exotic shellfish from each pond or other structure containing such shellfish to a department approved shellfish disease specialist for analysis no more than 14 days prior to the first discharge or harvest and submit the results of such analyses to the department immediately upon receipt.

(g) If the results of an inspection performed under subsection (f)(1) of this section indicate the presence of one or more manifestations of disease, the permittee shall immediately place the entire facility under quarantine condition and immediately submit samples of the harmful or potentially harmful exotic shellfish from the affected portion(s) of the facility to a department approved shellfish disease specialist for analysis. Results of such analyses shall be forwarded to the department immediately upon receipt.

(h) If the results of analyses performed under subsection (f)(2) of this section indicate the presence of disease, the permittee shall immediately place the entire facility under quarantine condition.

(i) If the results of inspections or analyses of harmful or potentially harmful exotic shellfish from a private facility quarantined under subsections (d), (g) or (h) of this section indicate the presence of disease, the facility shall remain under quarantine condition until the department removes the quarantine condition in writing or authorizes in writing other actions deemed appropriate by the department based on the required analyses.

(j) If the results of inspections or analyses performed under subsection (f) of this section indicate the absence of any manifestations of disease, the permittee may begin discharging from the facility.

§57.115. Transportation of Harmful or Potentially Harmful Exotic Species.

(a) Transport of live harmful or potentially harmful exotic species is prohibited except by:

(1) An aquaculturist in possession of a valid exotic species permit and an exotic species transport invoice;

(2) a commercial shipper acting for the permit holder in possession of an exotic species transport invoice; or

(3) persons holding harmful or potentially harmful exotic species pursuant to limitations of §57.113 of this title (relating to Exceptions).

(b) An aquaculturist transporting live triploid grass or black carp must have sales invoices which account for all triploid grass or black carp being transported and a copy of the United States Fish and Wildlife Service certification declaring that the carp being transported have been certified as being triploid in addition to meeting requirements of Chapter 134 of the Agriculture Code.

§57.116. Exotic Species Transport Invoice.

(a) An exotic species transport invoice shall contain all the following information correctly stated and legibly written: invoice number; date of shipment; name, address, and phone number of the shipper; name, address, and phone number of the receiver; aquaculture license number and exotic species permit number, if applicable; number and total weight of each harmful or potentially harmful exotic species; a check mark indicating interstate import, interstate export, or intrastate type of shipment. A completed invoice shall accompany each shipment of harmful or potentially harmful exotic species sold or transferred, and shall be sequentially numbered during the permit period; no invoice number shall be used more than once during any one permit period by the permittee.

(b) The exotic species transport invoice shall be provided by the permittee; one copy shall be retained by the permittee for a period of at least one year following shipping date and one copy shall be forwarded to the department's Exotic Species Program Leader.

(c) The permittee is responsible for supplying completed copies of the exotic species transport invoice to out-of-state dealers from which the permittee has purchased and or received harmful or potentially harmful exotic species, or to whom harmful or potentially harmful exotic species are transferred so that shipment will be properly marked and numbered upon delivery to the permittee in Texas.

(d) Owners, or their agents, of private ponds stocked with Mozambique tilapia or triploid grass carp by an Exotic Species Permit holder shall retain a copy of the exotic species transport invoice for a period of one year after the stocking date or as long as the tilapia or triploid grass carp are in the water, whichever is longer.

§57.117. Exotic Species Permit: Application Requirements.

(a) To be considered for an exotic species permit, the applicant shall:

(1) meet one or more of the following criteria:

(A) possess a valid aquaculture license;

(B) possess a valid permit from the Texas Commission on Environmental Quality authorizing operation of a wastewater treatment facility;

(C) possess a department approved research proposal involving use of harmful or potentially harmful exotic fish, shellfish or aquatic plants;

(D) operate a public aquarium approved for display of harmful or potentially harmful exotic fish, shellfish or aquatic plants; or

(E) operate a facility approved by the department for the possession and propagation of harmful or potentially harmful exotic aquatic plants;

(2) complete and submit an initial exotic species permit application on a form provided by the department;

(3) submit an accurate-to-scale plat of the aquaculture facility specifically including, but not limited to, location of:

(A) all private facilities and owner's name and physical address including a designation on the plat of all private facilities which will be used for possession of harmful or potentially harmful exotic species;

(B) all structures which drain private facilities;

(C) all points at which private facility effluent is discharged from the private facilities or the aquaculture facility;

(D) all structures designed to prevent escapement of harmful or potentially harmful exotic species from the aquaculture facility;

(E) any vats, raceways, or other structures to be used in holding harmful or potentially harmful exotic species;

(4) demonstrate to the department that an existing aquaculture facility, private facility or wastewater treatment facility meets requirements of §57.129 of this title (relating to Exotic Species Permit: Private Facility Criteria);

(5) remit to the department all applicable fees.

(b) Applicants for an exotic species permit for culture of harmful or potentially harmful exotic shellfish must meet all exotic species permit application requirements and requirements for disease free certification as listed in §57.114 of this title (relating to Health Certification of Harmful or Potentially Harmful Exotic Shellfish).

(c) An applicant for an exotic species permit shall provide upon request from the department documentation necessary to identify any harmful or potentially harmful exotic species and confirm the source of origin for the species for which a permit is sought.

(d) An applicant for an exotic species permit whose facility is located within the harmful or potentially harmful exotic species exclusion zone as defined in §57.111 of this title (relating to Definitions) must submit an emergency plan to the department for review and approval. The plan shall include measures sufficient to prevent release or escapement of permitted harmful or potentially harmful exotic species into public water during a natural catastrophe (such as a hurricane or flood).

§57.118. Exotic Species Permit Issuance.

(a) The department may issue an exotic species permit only to:

(1) an aquaculturist and only for species listed in §57.113(d), (e), and (k) of this title (relating to Exceptions);

(2) a wastewater treatment facility operator;

(3) department approved research programs; or

(4) a public aquarium for display purposes only.

(b) The department may issue an exotic species permit upon a finding by the department that:

(1) all application requirements as set out in §57.117 of this title (relating to Exotic Species Permit: Application Requirements) have been met;

(2) the aquaculture facility operated by the applicant and named in the permit meets or will meet the design criteria listed in §57.129 of this title (relating to Exotic Species Permit: Private Facility Criteria);

(3) the applicant has complied with all provisions of the Parks and Wildlife Code, §66.007, §66.015, and these rules during the one-year period preceding the date of application.

(c) Permits issued for aquaculture facilities, private facilities or wastewater treatment facilities under construction shall not authorize possession of harmful or potentially harmful exotic fish, shellfish or aquatic plants until such time as the department has certified that the aquaculture facility, private facilities or wastewater treatment facility as-built meets the requirements in §57.129 of this title.

§57.119. Exotic Species Permit: Requirements for Permits.

(a) A copy of the exotic species permit shall be:

(1) made available for inspection upon request of authorized department personnel; and

(2) prominently displayed on the premises of the aquaculture facility, private facilities or wastewater treatment facility named in the permit.

(b) Permittee must provide access to all facilities covered by the application to authorized department personnel during any hours in which operations pursuant to the exotic species permit are ongoing.

(c) If a permittee discontinues aquaculture, research activities or public aquarium display involving harmful or potentially harmful exotic species or discontinues wastewater treatment, the permittee shall:

(1) immediately and lawfully sell, transfer or destroy all remaining individuals of that species in possession; and

(2) notify the department's Exotic Species Program Leader at least 14 days prior to cessation of operation.

(d) Upon a request, a permittee shall provide an adequate number of fish, shellfish, or aquatic plants to authorized department employees for identification and analyses.

(e) In the event that the aquaculture facility, private facilities or a wastewater treatment facility of a permit holder appears in imminent danger of overflow, flooding, or release of harmful or potentially harmful exotic fish, shellfish or aquatic plants into public water, the permittee shall:

(1) immediately notify the department; and

(2) immediately begin implementation of the department-approved emergency plan.

(f) Except in case of an emergency, a holder of an exotic species permit authorizing possession of Litopenaeus vannamei must

notify the department at least 72 hours prior to, but not more than 14 days prior to any harvesting of permitted shellfish. In an emergency beyond the control of the permittee, notification of harvest must be made as early as practicable prior to beginning of harvest operations.

(g) A holder of an exotic species permit authorizing possession of harmful or potentially harmful exotic species may sell or transfer ownership of live individuals only to the holder of a valid exotic species permit specifically authorizing possession of transferred species.

(h) Upon discovery of release or escapement of harmful or potentially harmful exotic species from any private facilities authorized in an exotic species permit, the permittee must immediately halt discharge of all private facility effluent from the aquaculture facility. If the permittee's private facility is located within an aquaculture complex, upon discovery of release or escapement of harmful or potentially harmful exotic species, the permittee must immediately halt discharge of all private facility effluent.

(i) A holder of an exotic species permit must notify the department's Exotic Species Program Leader in the event of escapement or release of harmful or potentially harmful exotic species, within two hours of discovery.

(j) All devices required in the exotic species permit for prevention of discharge of harmful or potentially harmful exotic species must be in place and properly maintained prior to and at all times such species are in possession.

(k) All private facility effluent discharged from an aquaculture facility holding harmful or potentially harmful exotic species must be routed through all devices for prevention of discharge of such species as required in the permit.

(l) A permittee must notify the department's Exotic Species Program Leader in the event of change of ownership of the aquaculture facility named in that permittee's exotic species permit. Notification must be made immediately.

(m) Permits are not transferable from site to site.

§57.120. Exotic Species Permit: Expiration and Renewal.

(a) An exotic species permit required by these rules expires on December 31 of the year issued.

(b) The department may renew an exotic species permit upon finding that:

(1) the applicant has met application requirements in §57.117 of this title (relating to Exotic Species Permit: Application Requirements);

(2) the facility will meet all applicable facility design criteria listed in §57.129 of this title (relating to Exotic Species Permit: Private Facility Criteria);

(3) the applicant has complied with all provisions of the Parks and Wildlife Code, §66.007, §66.015, and these rules during the one-year period preceding the date of agency action on the application for renewal; and

(4) the applicant has submitted a renewal application and all required annual reports to the department as required in §57.123(a) and (b) of this title (relating to Exotic Species Permit Reports).

§57.121. Exotic Species Permit--Amendment.

(a) Exotic species permits may be amended upon a finding by the department that:

(1) the applicant has complied with all provisions of the Parks and Wildlife Code, §66.007, §66.015, all provisions of the permit, and these rules during the one-year period preceding the date of application;

(2) the applicant has met all applicable application requirements under §57.117 of this title (relating to Exotic Species Permit: Application Requirements); and

(3) the facilities as altered will meet the private facility criteria in §57.129 of this title (relating to Exotic Species Permit: Private Facility Criteria).

(b) Exotic species permits must be amended to reflect any:

(1) addition or deletion of species of harmful or potentially harmful exotic fish, shellfish, or aquatic plants held pursuant to the permit;

(2) intended redistribution of harmful or potentially harmful fish, shellfish, and aquatic plants into private facilities not authorized in the permit;

(3) change in methods of preventing discharge of harmful or potentially harmful exotic fish, shellfish, and aquatic plants;

(4) change in discharge of private facility effluent from aquaculture facilities or wastewater treatment facilities; and

(5) change in existing design criteria listed in §57.129 of this title.

(c) Applicants seeking amendment of exotic species permits, including those issued prior to January 23, 1992, must meet all application requirements listed in §57.117 of this title and facility design criteria listed in §57.129 of this title.

§57.129. Exotic Species Permit: Private Facility Criteria.

(a) The aquaculture facility or wastewater treatment facility must be designed to prevent discharge of water containing adult or juvenile harmful or potentially harmful exotic species, their eggs, seeds or other reproductive parts from the permittee's property.

(b) Aquaculture facilities holding harmful or potentially harmful exotic species shall have at least three appropriately designed and constructed permanent screens placed between any point in the aquaculture facility where harmful or potentially harmful exotic species are intended to be in water on the aquaculture facility and the point where private facility effluent first leaves the aquaculture facility.

(1) Screen mesh shall be of an appropriate size for each stage of exotic species growth and development.

(2) One screen must be permanently affixed in front of the final discharge pipe in the harvest structure and remain in place while the pond is in use. This screen and backing material must be of sufficient strength to withstand a water level differential of the height of the discharge area.

(3) At those facilities which discharge into public waters, one screen must be secured over the terminal end of the discharge pipe at all times. This screen must be secured in such a fashion as to prevent escape of permitted species. A second, additional screen must be secured over the terminal end of the discharge pipe during all harvest activities.

(4) Screens must be designed and constructed such that screens can be maintained and cleaned without reducing the level of protection against release of harmful or potentially harmful exotic species. The department may approve alternate methods of preventing discharge of harmful or potentially harmful exotic species upon a finding that those methods are at least as effective in preventing discharge of adult or juvenile harmful or potentially harmful exotic species, their eggs, seeds, or other reproductive parts from the permittee's property.

The point of discharge of all mechanical harvesting devices must be double screened to prevent escapement of harmful or potentially harmful exotic species.

(c) An aquaculture facility that is to contain species or hybrids of species listed in §57.113 of this title (relating to Exceptions) and wastewater treatment facilities containing permitted exotic species which are within the 100-year flood plain, referred to as Zone A on the National Flood Insurance Program Flood Insurance Rate Map, must be enclosed within an earthen or concrete dike or levee constructed in such a manner to exclude all flood waters and such that no section of the crest of the dike or levee is less than one foot above the 100-year flood elevation. Dike design or construction must be approved by the department before issuance of a permit.

(d) An aquaculture facility containing harmful or potentially harmful exotic shellfish shall be capable of segregating stocks of shellfish which have not been certified as free of disease from other stocks of shellfish on that aquaculture facility.

(e) An aquaculture facility containing harmful or potentially harmful exotic species must have in place security measures designed to prevent unrestricted or uncontrolled access to any private facilities containing harmful or potentially harmful exotic species. Security measures must prevent unauthorized removal of such species from the aquaculture facility.

(f) For aquaculture facilities that are part of an aquaculture complex, the following additional facility standards shall apply.

(1) Each permittee shall maintain in the common drainage at least one screen for preventing the movement of harmful or potentially harmful exotic species between the point where private facility effluent from the permittee's private facility enters the common drainage and each point where an adjacent aquaculturist's private facility effluent enters the common drainage. The adequacy of design and construction of such screens or other structures shall be determined by the department as provided in subsection (b) of this section.

(2) Each permittee within the complex must have authority to stop the discharge of private facility effluent from the complex in the event of escapement or release of harmful or potentially harmful exotic species from that permittee's private facility.

§57.134. Wastewater Discharge Authority.

(a) An applicant for an initial exotic species permit must provide the following:

(1) written documentation demonstrating that the applicant possesses the appropriate valid wastewater discharge authorization or has received an exemption from the Texas Commission on Environmental Quality if the aquaculture facility, aquaculture complex, or private facility is designed such that a discharge of waste into or adjacent to water in the state will, or is likely to occur; or

(2) adequate documentation to demonstrate that the facility is designed and will be operated in a manner such that no discharge of waste into or adjacent to water in the state will, or is likely to occur.

(b) An applicant for an amendment or a renewal of an exotic species permit must provide the following:

(1) written documentation demonstrating that the applicant possesses or has timely applied for and is diligently pursuing the appropriate wastewater discharge authorization or exemption from the Texas Commission on Environmental Quality in accordance with the Texas Pollutant Discharge Elimination System (TPDES) General Permit for concentrated aquatic animal production facilities TXG 130000, if the aquaculture facility, aquaculture complex, or private facility is designed such that a discharge of waste into or adjacent to water in the state will, or is likely to occur; or

(2) adequate documentation to demonstrate that the facility is designed and will be operated in a manner such that no discharge of waste into or adjacent to water in the state will, or is likely to occur.

(c) An exotic species permittee whose wastewater discharge authorization or exemption is revoked, suspended or annulled by the Texas Commission on Environmental Quality will be treated as an applicant for an initial permit under subsection (a) of this section.

(d) An aquaculturist raising only exotic aquatic plants is not required to obtain a permit from the Texas Commission on Environmental Quality for the purposes of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606549
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: December 26, 2006
Proposal publication date: July 21, 2006
For further information, please call: (512) 389-4775

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CHAPTER 65. WILDLIFE
SUBCHAPTER K. RAPTOR PROCLAMATION

31 TAC §65.269

The Texas Parks and Wildlife Commission adopts an amendment to §65.269, concerning the Raptor Proclamation, without changes to the proposed text as published in the September 29, 2006, issue of the *Texas Register* (31 TexReg 8203).

The amendment to §65.269, concerning Trapping Season and Collecting Areas, eliminates the prohibition on trapping activities in seven counties in far west Texas (Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, Presidio, and Terrell). The prohibition was originally implemented in 1982 to protect endangered, threatened, and recovering species such as the peregrine falcon, golden eagle, and zone-tailed hawk from accidental trapping mortality. In reviewing the rule, the department has determined that because the number of falconers is so small (fewer than 200 persons) and the likelihood of trapping mortality is remote, there is no danger of biological harm to existing populations by allowing permitted falconers to trap raptors in those counties.

The amendment will function by allowing the trapping of raptors in Brewster, Culberson, El Paso, Hudspeth, Jeff Davis, Presidio, and Terrell counties by permitted falconers.

The department received one comment opposing adoption of the proposed amendment. The commenter stated that raptors should not be trapped from the wild because captive-bred raptors can be readily obtained. The department disagrees with the comment and responds that since there is no biological threat to raptor resources as a result of trapping for falconry purposes,

there is no reason to prohibit trapping activities. No changes were made as a result of the comment.

The department received 41 comments supporting adoption of the proposed amendment.

The Texas Hawking Association commented in favor of adoption of the proposed amendment.

The amendment is adopted under Parks and Wildlife Code, §49.014, which authorizes the department to prescribe rules for the taking, capture, possession, propagation, transportation, export, import, and sale of raptors, time and area from which raptors may be taken or captured, and species that may be taken or captured, including rules governing annual reporting requirements and procedures.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 5, 2006.

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Ann Bright
General Counsel
Texas Parks and Wildlife Department
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 3. TAX ADMINISTRATION

SUBCHAPTER B. NATURAL GAS

34 TAC §3.23

The Comptroller of Public Accounts adopts new §3.23, concerning credits for qualifying low producing wells, without changes to the proposed text as published in the October 27, 2006, issue of the *Texas Register* (31 TexReg 8827).

The new section covers the description of the credit and the process for filing an application for approval of the credit. This section is being adopted pursuant to House Bill 2161, 79th Legislature, 2005.

No comments were received regarding adoption of the new section.

The new section is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §201.059.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 7, 2006.

TRD-200606557
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
Effective date: December 27, 2006
Proposal publication date: October 27, 2006
For further information, please call: (512) 475-0387

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SUBCHAPTER C. CRUDE OIL PRODUCTION TAX

34 TAC §3.39

The Comptroller of Public Accounts adopts new §3.39, concerning credits for qualifying low producing oil leases, with changes to the proposed text as published in the October 27, 2006, issue of the *Texas Register* (31 TexReg 8828). A change is necessary in subsection (a)(4) to correct a grammatical error to change the word "of" to "or".

The new section covers the description of the credit and the process for filing an application for approval of the credit. This section is being adopted pursuant to House Bill 2161, 79th Legislature, 2005.

No comments were received regarding adoption of the new section.

The new section is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The new section implements Tax Code, §202.058.

§3.39. Credits for Qualifying Low Producing Oil Leases.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Commission--The Railroad Commission of Texas.

(2) Operator--The person responsible under law or commission rules for the physical operation of a lease.

(3) Average Taxable Price of Oil--The previous three month average price of oil using a price index listed in Tax Code, §202.058(c). The average will be computed by taking the closing price of each market day and dividing it by the total market days in the three-month period. This average price will then be adjusted to 2005 dollars.

(4) Qualified Low Producing Lease--An oil lease that produces no more than 15 barrels of oil per day of production per well during the three-month period prior to the beginning date of the exemption. For purposes of qualifying the lease, the production per day is determined by using the monthly well production report made to the commission and dividing the sum of the production reported on the lease by the sum number of well days, where a well day is one well producing for one day. The calculation will use the three-month period prior to the beginning date of the exemption. The lease may also qualify if the recoverable oil for a 90-day period prior to qualifying is 5.0% or less per barrel of produced water.

(b) For each lease qualifying under this section, the comptroller will require the following information from the operator of the lease.

(1) A copy of the monthly production report made to the commission for the lease for the three-month period prior to the exemption beginning date.

(2) A list of the producing wells on the lease and supporting documentation to show the number of days each well was producing during the three-month period.

(3) A completed comptroller exemption application for the lease.

(4) The starting date that the lease met the three-month production limitations qualifying the well as a low-producing well.

(5) A statement as to whether tax has been paid on the crude oil for periods after the effective date of the exemption, and the name of the party paying the tax.

(6) If the lease is being qualified under Tax Code, §202.058(a)(2)(B), the operator will need to send documentation that the well has a recoverable oil rate of 5.0% or less per barrel of produced water for the three-month period. An example of acceptable documentation is a production record showing the amount of water produced and the amount of oil produced for the three-month period. A taxpayer getting approval under this section must also send the $100 filing fee with the application.

(c) The monthly average taxable price of oil will be published in the Texas Register the month following the actual production month. This publication will notify the taxpayer of the availability of the exemption prior to the due date of the report. Tax Code, §202.058(c), (d), and (e) will be used to define the credit applicable for each reporting month.

(1) If the monthly average taxable price of oil is more than $30 per barrel, there will be no exemption for that reporting month.

(2) If the monthly average taxable price of oil is more than $25 per barrel, but not more than $30 per barrel, there will be a 25% credit for oil sold from a qualified lease for that reporting month.

(3) If the monthly average taxable price of oil is more than $22 per barrel, but not more than $25 per barrel, there will be a 50% credit for oil sold from a qualified lease for that reporting month.

(4) If the monthly average taxable price of oil is $22 per barrel or less, there will be a 100% credit for oil sold from a qualified lease for that reporting month.

(d) If the tax is paid at the full rate provided by Tax Code, Chapter 202, on oil produced on or after the effective date of the tax exemption but before the date the comptroller approves an application for the tax exemption, the operator is entitled to a credit on taxes due under Tax Code, Chapter 202, in an amount equal to the credit approved for that period. To receive a credit, the operator or the party remitting the tax must apply to the comptroller by filing amended reports. If a party other than the operator has remitted the tax, the operator must provide the party remitting the tax a copy of the approved comptroller application form that provides that the lease qualifies for the tax exemption.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.40

The Comptroller of Public Accounts adopts new §3.40, concerning tax credit for enhanced efficiency equipment, without changes to the proposed text as published in the October 27, 2006, issue of the *Texas Register* (31 TexReg 8829).

The adoption provides a description of the tax credit for enhanced efficiency equipment and the process for filing an application for approval of the credit. This section is being adopted pursuant to House Bill 2161, 79th Legislature, 2005.

No comments were received regarding adoption of the new section.

This new rule is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The adoption implements Tax Code, §202.061.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER V. FRANCHISE TAX

34 TAC §3.546

The Comptroller of Public Accounts adopts an amendment to §3.546 concerning taxable capital: nexus, without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8619).

The amendment to subsection (a) reflects a legislative change made from 78th Legislature, 2003, House Bill 2424. The amendment to subsection (d) reflects the repeal of §3.542 and subsequent placement of the trade show exemption in §3.541.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §171.001(a) and §171.084.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.549

The Comptroller of Public Accounts adopts an amendment to §3.549 concerning taxable capital: apportionment, without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8619).

The amendment to (e)(5) reflects a clarification of agency policy. The amendment to (e)(28) reflects the court ruling in Gulf Publishing Co. v. Rylander, Travis County District Court, February 2001. The amendment to (e)(38) reflects a clarification of agency policy. The amendment to (e)(41)(I) reflects a legislative change made from 78th Session, 2003, House Bill 2424.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.103, 171.104, 171.105, 171.106 and 171.112.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200606583
Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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For further information, please call: (512) 475-0387

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34 TAC §3.557

The Comptroller of Public Accounts adopts an amendment to §3.557, concerning earned surplus: apportionment, without changes to the proposed text as published in the October 20, 2006, issue of the *Texas Register* (31 TexReg 8621).

The amendments to (e)(5) and (e)(33)(D) reflect clarification of agency policy.

No comments were received regarding adoption of the amendment.

This amendment is adopted under Tax Code, §111.002, which provides the comptroller with the authority to prescribe, adopt, and enforce rules relating to the administration and enforcement of the provisions of Tax Code, Title 2.

The amendment implements Tax Code, §§171.1032, 171.1051, 171.106, and 171.110.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Martin Cherry
Chief Deputy General Counsel
Comptroller of Public Accounts
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PART 6. TEXAS MUNICIPAL RETIREMENT SYSTEM

CHAPTER 123. ACTUARIAL TABLES AND BENEFIT REQUIREMENTS

34 TAC §123.6

The Texas Municipal Retirement System adopts 34 TAC Chapter 123, §123.6, regarding the calculation of retirement benefits. The new section is adopted with changes to the proposed text as published in the October 27, 2006, issue of the *Texas Register* (31 TexReg 8830).

Section 123.6 is being added to clarify the calculation of retirement benefits in certain circumstances for members eligible for the updated service credit. The new rule insures that the benefit calculation is reasonably related to member tenure and contributions and is in accordance with applicable law. A minor change was made to the section as proposed to clarify the effective date of the change. The change does not cause the rule to be applied to a different class of persons than those subject to the rule as initially proposed.

No comments were received regarding the adoption of this new section.

This section is adopted under Texas Government Code, Chapter 855, §855.102, which provides the Board of Trustees of the Texas Municipal Retirement System with the authority to adopt rules necessary or desirable for the efficient administration of the System.

Texas Government Code, §853.402 is affected by this new rule.

§123.6. Retirement Benefit Calculation.

Any person retiring on or after December 31, 2006, whose average updated service compensation would be computed as described in §853.402(g), Government Code, would be based on less than 36 months of contributions and would be more than 120 percent of the person's average updated service compensation if it had been computed as described in §853.402(b), Government Code shall be conclusively deemed to receive a benefit that is unconstitutional and shall not receive a retirement benefit based on that average. The person may elect to instead receive a benefit in which the updated service credit is computed using an average updated service compensation that is no more than 120 percent of the person's average updated service compensation computed as described in §853.402(b), Government Code.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 6, 2006.

TRD-200606535
Eric W. Davis
Interim Executive Director
Texas Municipal Retirement System
Effective date: December 26, 2006
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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 4. RIGHTS AND PROTECTION OF INDIVIDUALS RECEIVING MENTAL RETARDATION SERVICES

SUBCHAPTER C. RIGHTS OF INDIVIDUALS WITH MENTAL RETARDATION

40 TAC §§4.101, 4.103, 4.105, 4.107, 4.109, 4.111, 4.113, 4.115, 4.117, 4.119, 4.121

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts new §§4.101, 4.103, 4.105, 4.107, 4.109, 4.111, 4.113, 4.115, 4.117, 4.119, and 4.121, in Chapter 4, governing Rights and Protection of Individuals Receiving Mental Retardation Services. The new §§4.105, 4.109, 4.113, and 4.115 are adopted with changes to the proposed text published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7284). The new §§4.101, 4.103, 4.107, 4.111, 4.117, 4.119, and 4.121, are adopted without changes to the proposed text.

The new sections are adopted to clarify the requirements for a state mental retardation facility (state MR facility) and a mental retardation authority (MRA) regarding their responsibilities to inform individuals with mental retardation of their individual rights and educate their staff of these requirements. The requirements also direct the state MR facility and MRA to employ a rights protection officer dedicated to protecting these rights. The new sections are adopted to require a state MR facility and an MRA to explain an individual's rights using the rights handbooks developed by DADS. The new sections are adopted to reflect current agency names, terminology, and legal citations.

DADS received written comments from the Parent Association for the Retarded of Texas, Inc. (PART), Lakes Regional MHMR Center, and one parent/guardian of a state mental retardation facility resident. A summary of the comments and the responses follow.

Comment: Concerning §4.105(9), a commenter suggested that the definition of services and supports be changed to accurately reflect current services and terminology.

Response: The agency agrees with the comment and has changed the definition of services and supports in §4.105(9) by replacing "support services" and "day services" with "community services."

Comment: Concerning §4.107(2), a commenter suggested the statement "recognizing that, on a case-by-case basis, that setting may be in an institution" be added after "the right to live in the least restrictive setting." The commenter expressed concern that many people use the term "least restrictive setting" to mean only a community setting.

Response: The rule language was not changed in response to this comment. The agency believes this concept is included in this section, as it states that the setting can be a variety of living situations.

Comment: Concerning §4.109(a), a commenter noted that for some low functioning individuals an LAR must make many decisions for the individual, but the commenter made no suggestion for a change to the rule.

Response: The agency acknowledges that the scope of decisions that must be made for an individual depends on the individual's level of functioning. The rule language was not changed in response to this comment.

Comment: Concerning §4.109(b)(1), a commenter noted that some individuals are not able to participate in the development and review of their treatment plans due to their levels of functioning, but made no suggestion for a change to the rule.

Response: The agency acknowledges that some individuals will not be able to exercise the referenced right, but, nevertheless, this provision acknowledges that right. The rule language was not changed in response to this comment.

Comment: Concerning §4.109(b)(2), a commenter noted that the right to "choose" is not upheld if it is a state school.

Response: The rule applies to state MR facilities and it requires an individual and LAR be given an opportunity to choose from several appropriate services, if possible. The rule language was not changed in response to this comment.

Comment: Concerning §4.109(b)(8), a commenter noted that the word "mental" was omitted from the phrase, "determination of retardation of the individual."

Response: The agency agrees with the comment and has amended the language in §4.109(b)(8) to "determination of mental retardation of the individual."

Comment: Concerning §4.109(c)(5), a commenter suggested that the list explaining mental and dental care and treatment be divided into separate paragraphs.

Response: The rule language for §4.109(c)(5) is based on Texas Health and Safety Code, §592.052, and, therefore, the rule language was not changed in response to this comment.

Comment: Concerning §4.113(b)(1), (b)(5), and (c), a commenter suggested that "LAR" be added when describing some of the duties of a rights protection officer.

Response: The agency agrees with the comment and has added references to an LAR in §4.113(b)(1), (b)(5), and (c).

Comment: Concerning §4.113(b), a commenter suggested that paragraph (8) be added to include acting as the liaison between the state MR facility or MRA and DADS Consumer Rights and Services as an additional duty of a rights protection officer.

Response: The agency agrees with the comment and has added the suggested language.

Comment: Concerning §4.115, a commenter asked if "Consumer Rights and Services" included LARs.

Response: DADS Consumer Rights and Services does assist LARs, as well as individuals. The agency has retitled §4.115 as "DADS Consumer Rights and Services."

In addition, the agency has amended §4.113(b)(6) to reflect that a rights protection officer may serve as the liaison with the Department of Family and Protective Services or may coordinate with another person who serves as the liaison.

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, §592.002, which gave the Texas Department of Mental Health and Mental Retardation the power and duty to ensure, by rule, the implementation of the rights guaranteed in Chapter 592, Rights of Persons with Mental Retardation; and House Bill 2292 of the 78th Texas Legislature, Regular Session, §1.20(a)(3), which transferred that power and duty to DADS.

§4.105. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Actively involved person--A person with significant and ongoing involvement with an individual who lacks the ability to provide legally adequate consent and who does not have an LAR. The MRA providing services and supports to the individual or the state MR facility in which the individual resides determines if the person is actively involved based on the person's:

(A) observed interactions with the individual;

(B) knowledge of and sensitivity to the individual's preferences, values, and beliefs;

(C) availability to the individual for assistance or support; and

(D) advocacy for the individual's preferences, values, and beliefs.

(2) DADS--The Department of Aging and Disability Services.

(3) Individual--A person who has mental retardation.

(4) LAR (legally authorized representative)--A person authorized by law to act on behalf of an individual with regard to a matter described in this subchapter, which may be a parent, guardian, or managing conservator of a minor individual, or the guardian of an adult individual.

(5) Local service area--A geographic area composed of one or more Texas counties that determines the MRA from which an individual may receive services.

(6) Mental retardation--Consistent with THSC, §591.003, significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(7) MRA (mental retardation authority)--An entity to which the Texas Health and Human Services Commission's authority and responsibility described in THSC, §531.002(11) has been delegated.

(8) PMRA (Persons with Mental Retardation Act)--Texas statutes relating to persons with mental retardation codified in THSC, Chapters 591 - 597.

(9) Services and supports--Assistance to an individual through an MRA or a state MR facility, which may include:

(A) eligibility determination;

(B) service coordination;

(C) community services; and

(D) residential assistance.

(10) State MR facility (state mental retardation facility)--A state school or a state center operated by DADS.

(11) Subaverage general intellectual functioning--Consistent with THSC, §591.003, measured intelligence on standardized general intelligence tests of two or more standard deviations (not including standard error of measurement adjustments) below the age-group mean for the tests used.

(12) THSC (Texas Health and Safety Code)--A codification of Texas statutes relating to health and safety.

§4.109. Rights of an Individual Receiving Services and Supports and an LAR.

(a) An LAR has the authority to make certain decisions on an individual's behalf.

(b) An individual receiving services and supports and an LAR have the following rights:

(1) the right to participate in the development and periodic review of an individualized treatment plan and to receive the individual's progress in writing at reasonable intervals, as described in THSC, §§592.033 - 592.035;

(2) the right to choose from several appropriate services, if possible, as described in THSC, §592.035(b);

(3) the right to withdraw the individual from services and supports, as described in THSC, §592.036;

(4) the right to not receive unnecessary or excessive medications, as described in THSC, §592.038;

(5) the right to initiate a complaint on behalf of the individual, as described in THSC, §592.039;

(6) the right to be given written notice of the rights guaranteed by the PMRA in plain and simple language when the individual begins to receive services and supports, as described in THSC, §592.040;

(7) the right to have access to information contained in the individual's record, as described in THSC, §595.004; and

(8) the right to request an administrative hearing to contest a proposed transfer or discharge of the individual from a state MR facility, the denial of a requested discharge or transfer of the individual from a state MR facility, or the results of a determination of mental retardation of the individual, as described in Subchapter D of this chapter (relating to Administrative Hearings Under the PMRA).

(c) An individual residing in a state MR facility has the following additional rights, as described in THSC, §592.051 and §592.052:

(1) the right to a normal residential environment;

(2) the right to a humane physical environment;

(3) the right to communication and visits;

(4) the right to possess personal property; and

(5) the right to prompt, adequate, and necessary medical and dental care and treatment for physical and mental ailments and to prevent an illness or disability.

§4.113. Rights Protection Officer at a State MR Facility or MRA.

(a) A state MR facility and an MRA must employ a rights protection officer whose primary duty is to advocate for the rights of individuals served by that state MR facility or MRA and to assist LARs in advocating for the rights of individuals.

(b) The superintendent of a state MR facility and the chief executive officer of an MRA must specify the duties of the rights protection officer, which must include:

(1) receiving a complaint regarding the violation of an individual's or LAR's rights or the quality of services and supports;

(2) investigating a complaint or forwarding the complaint to the appropriate investigatory entity;

(3) advocating for the resolution of a complaint;

(4) reporting the results of an investigation to the complainant, consistent with confidentiality rights;

(5) reviewing policies, procedures, and practices of the state MR facility or MRA that affect the rights of an individual and LAR to ensure that the individual's and LAR's rights are protected;

(6) serving as or coordinating with the liaison between the state MR facility or MRA and the Department of Family and Protective Services regarding allegations of abuse or neglect;

(7) acting as the liaison between the state MR facility or MRA and advocacy organizations; and

(8) acting as the liaison between the state MR facility or MRA and DADS Consumer Rights and Services.

(c) The superintendent of a state MR facility and the chief executive officer of an MRA must ensure that the duties of the rights protection officer do not include any supervision of or responsibility for the delivery of services and supports that would represent a conflict of interest with the rights protection officer's primary duty of advocacy on an individual's and LAR's behalf.

(d) A state MR facility and an MRA must ensure that in every program and residential area of the state MR facility and MRA:

(1) the name, telephone number, e-mail address, and mailing address of the rights protection officer are posted conspicuously; and

(2) a telephone is accessible for an individual to contact the rights protection officer.

§4.115. DADS Consumer Rights and Services.

(a) A state MR facility and an MRA must post DADS' Consumer Rights and Services toll-free number (1-800-458-9858) conspicuously in every program and residential area of the state MR facility or the MRA.

(b) A consumer rights representative in DADS Consumer Rights and Services assists an individual or an LAR upon request if DADS or an MRA denies services to the individual, including admission to a state MR facility.

(c) The consumer rights representative:

(1) explains and provides information about services and supports and the rules, procedures, and guidelines applicable to the individual who has been denied services; and

(2) assists the individual and the LAR in gaining access to appropriate services and supports or in placing the individual's name on an appropriate interest list.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2006.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2007
Proposal publication date: September 8, 2006
For further information, please call: (512) 438-4162

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CHAPTER 8. CLIENT CARE--MENTAL RETARDATION SERVICES

SUBCHAPTER Y. RIGHTS OF MENTALLY RETARDED PERSONS

40 TAC §§8.621 - 8.629

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts the repeal of §§8.621 - 8.629 in Chapter 8, governing Client Care--Mental Retardation Services, without changes to the proposal as published in the September 8, 2006, issue of the *Texas Register* (31 TexReg 7288).

The repeal is adopted to delete rules governing the rights of individuals with mental retardation that have become outdated. The terminology and practices concerning these rights will be adopted in Chapter 4, Rights and Protection of Individuals Re-

ceiving Mental Retardation Services, new Subchapter C, Rights of Individuals with Mental Retardation. The rules concerning the rights of individuals with mental retardation will be up to date, as well as more clearly written and easily understood. The rules for Chapter 4, Subchapter C, are published elsewhere in this issue of the *Texas Register*.

DADS received no comments regarding adoption of the repeal.

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Health and Safety Code, §592.002, which gave the Texas Department of Mental Health and Mental Retardation the power and duty to ensure, by rule, the implementation of the rights guaranteed in Chapter 592, Rights of Persons with Mental Retardation; and House Bill 2292 of the 78th Texas Legislature, Regular Session, §1.20(a)(3), which transferred that power and duty to DADS.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-4162

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CHAPTER 41. VENDOR FISCAL INTERMEDIARY PAYMENTS

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts the repeal of §§41.101, 41.103, and 41.105 in Chapter 41, governing Vendor Fiscal Intermediary Payments; and adopts new §§41.101, 41.103, 41.105, 41.107, 41.109, 41.111, 41.201, 41.203, 41.205, 41.207, 41.209, 41.211, 41.213, 41.215, 41.217, 41.219, 41.221, 41.223, 41.225, 41.227, 41.229, 41.231, 41.233, 41.235, 41.237, 41.239, 41.241, 41.243, 41.301, 41.303, 41.305, 41.307, 41.309, 41.311, 41.313, 41.315, 41.317, 41.319, 41.321, 41.323, 41.325, 41.327, 41.329, 41.331, 41.333, 41.335, 41.337, 41.339, 41.401, 41.403, 41.405, 41.407, 41.409, 41.501, 41.503, 41.505, 41.507, 41.509, 41.511, 41.601, 41.603, 41.605, 41.701, and 41.801, in Chapter 41, governing Consumer Directed Services Option.

New §§41.101, 41.103, 41.107, 41.109, 41.111, 41.201, 41.205, 41.207, 41.221, 41.225, 41.227, 41.229, 41.231, 41.233, 41.235, 41.237, 41.239, 41.241, 41.243, 41.301, 41.305, 41.309, 41.319, 41.321, 41.323, 41.327, 41.331, 41.337, 41.339, 41.401, 41.409, 41.507, 41.601, 41.603, and 41.605 are adopted with changes to the proposed text published in the September 15, 2006, issue of the *Texas Register* (31 TexReg 7957). The repeal of §§41.101, 41.103, and 41.105 and new §§41.105, 41.203, 41.209, 41.211, 41.213, 41.215, 41.217, 41.219, 41.223, 41.303, 41.307, 41.311, 41.313, 41.315, 41.317, 41.325, 41.329, 41.333, 41.335, 41.403, 41.405, 41.407, 41.501, 41.503, 41.505, 41.509, 41.511, 41.701, and 41.801 are adopted without changes to the proposed text.

The repeal and new sections are adopted to provide a new and more comprehensive set of rules governing the Consumer Directed Services (CDS) option.

When the concept of the CDS option was introduced five years ago in response to Texas Government Code, §531.051, the rules in Chapter 41, Vendor Fiscal Intermediary Payments, provided only minimum requirements concerning the financial management component of the CDS option and the roles and responsibilities of contractors and consumers. DADS community and waiver program staff now have significantly more experience with the CDS option and knowledge of the necessary requirements to effectively manage the CDS option. The adopted rules provide a much greater level of detail and guidance for anyone seeking to participate in the CDS option. The adopted rules apply to all DADS community services programs and DADS Medicaid programs that offer the CDS option, unless stated differently in a specific program's rules.

The CDS option is a service delivery option in which an individual or legally authorized representative (LAR) employs and retains service providers and directs the delivery of program services. An individual choosing to participate in the CDS option is supported by a consumer directed services agency (CDSA) chosen by the individual to provide financial management services. An individual or LAR may also choose to receive additional assistance through support consultation services when support consultation is offered by the individual's program. The adopted rules provide rules that detail how the CDS option works, who may participate in it, the roles and responsibilities of individuals, employers, CDSAs, contractors, service planning teams, and support advisors within the CDS option, and the procedures for enrollment, transfer, suspension, termination, budgeting, and receiving support consultation services.

DADS received written comments from the Mission Road Developmental Center, the Texas Association for Home Care, J-MAG Enterprises, Mosaic, and the Private Providers Association of Texas (PPAT). A summary of the comments and the responses follow.

Comment: A commenter noted concern regarding monitoring of an individual's health and safety in the CDS option.

Response: The agency notes that the adopted rules do not replace any program rules or requirements for monitoring of an individual's health and safety. The provider of case management services continues to review all services received by an individual and to monitor an individual's health and safety. The additional providers of service through CDS (the CDSA and, when applicable, the support advisor) are also responsible for reporting issues and concerns related to an individual's health and safety to the case manager and to proper authorities. The rule language was not changed in response to the comment.

Comment: A commenter indicated that the monitoring functions of the case manager, support advisor, employer, and CDSA should be more specific.

Response: The agency responds that the rules in Chapter 41 state the specific roles and responsibilities, including monitoring responsibilities, of each party in both the individual's program and in the CDS option. The agency will provide specific information to case managers and support advisors related to respective monitoring requirements and other responsibilities during trainings prior to the implementation of the rules. The rule language was not changed in response to the comment.

Comment: A commenter noted concerns about safeguarding funds for support consultation services through the CDS option to prevent the employer or designated representative (DR) from pocketing the money and having the case manager deliver the service.

Response: In the CDS option, funds for support consultation services are dispensed by the CDSA directly to an eligible, certified support advisor following receipt of documentation of service delivery. The agency believes that sufficient safeguards are included in Chapter 41, Subchapter F, to prevent an individual or LAR or DR from fictitiously employing a support advisor. The rule language was not changed in response to the comment.

Comment: A commenter indicated that case management responsibilities are not clearly defined in the rules and do not clarify when an individual may be terminated from participating in the option.

Response: The agency responds that the roles and responsibilities of the case management service provider are clearly delineated in Chapter 41 and in applicable program rules for the individual's program. Section 41.407 provides specific directions on when an individual's participation in the CDS option may be terminated by the service planning team. The individual may request a voluntary termination of participation in the CDS option at any time. The rule language was not changed in response to the comment.

Comment: Concerning §41.217, a commenter indicated confusion concerning the roles of the employer and the service planning team in the development and implementation of a service back-up plan.

Response: A service back-up plan is required when the service planning team determines that the delivery of a service is critical to the health and welfare of the individual. The employer or DR is responsible for development of a service back-up plan, with assistance from others as requested. The individual's service planning team must review and approve each required service back-up plan prior to implementation by the employer or DR. The rule language was not changed in response to the comment.

Comment: A commenter recommended that "independent personal financial management" be included in as criteria for participation in the CDS option.

Response: The agency does not believe that additional criteria for participation in the CDS option is necessary or appropriate. Financial management services (FMS) is the required service for participation in the CDS option. FMS must be provided by a CDSA to an employer participating in the CDS option. The rule language was not changed in response to the comment.

Comment: A commenter indicated that there is no accountability for any one provider providing services through the CDS option and that protective measures are needed for employees, CDSAs, and case managers.

Response: The agency has outlined roles and responsibilities of employees, CDSAs, and case managers in Chapter 41. Each employee, CDSA, and case manager in the CDS option is accountable for specific roles, responsibilities, and oversight in the CDS option. The rule language was not changed in response to the comment.

Comment: A commenter indicated that some consumers will not understand the option and will rely on providers and families to continue making decisions for them.

Response: The agency notes that the rules provide for informed decision making by having rules that require: (1) the case management service provider to provide an overview of the service delivery option to the individual and LAR; and (2) the CDSA to provide orientation and ongoing training and support. The individual's program rules and Chapter 41 require the case manager and the individual's service planning team to monitor the individual's participation in the CDS option. The employer may appoint a willing adult to act on the employer's behalf in the CDS option. The case manager convenes the individual's service planning team in accordance with program rules and Chapter 41, Subchapter D, with regard to interventions, corrective actions, and suspensions and terminations specific to participation in the CDS option. The rule language was not changed in response to the comment.

Comment: One commenter asked who provides the individual or DR with the training to be able to train the direct service provider.

Response: The agency responds that an individual or LAR may choose to receive support consultation as an optional CDS service provided by a support advisor, as described in Chapter 41. Support consultation is a service that assists and trains the individual or LAR in meeting the required employer responsibilities of the CDS option, including training an employee and ensuring successful delivery of program services. The rule language was not changed in response to the comment.

Comment: A commenter expressed concern that Chapter 41 adds additional responsibilities to program providers and case managers.

Response: Chapter 41 delineates the roles and responsibilities of the employer and others without duplication in the CDS option. The case management service provider: (1) remains the primary point of contact for individuals participating in the CDS option; and (2) retains responsibility for an individual's service planning process. The program provider retains responsibilities only for those services delegated to the provider in the individual's care plan. The rule language was not changed in response to the comment.

Comment: A commenter requested further clarification of a "contractor" and the addition of an "entity" in Subchapter A, Definitions.

Response: The agency agrees, and has added a definition of "entity" and clarified the definition of "contractor" in §41.103.

Comment: A commenter recommended language specific to service agreements between and employer and a contractor.

Response: The agency, when developing these service agreements, will consider the suggested language provided by the commenter. The rule language was not changed in response to the comment.

Comment: Concerning §41.225, a commenter suggested that a criminal conviction history check not be required for a contractor or a service provider that is provided by a contracted entity.

Response: The agency has included this requirement in rule as an additional assurance for the health and welfare of individuals participating in the CDS option. The agency is requiring a criminal conviction history check for each contractor retained directly by the employer. The rule has been revised by adding §41.225(l) to require each entity providing services to certify that a service provider delivering a direct service to an individual in the CDS option meets the criminal conviction history check requirement.

Comment: A recommendation was received that the service agreement between a contractor and an entity for one or more service providers should allow the contractor or entity to certify compliance with criminal conviction checks, required registry checks, licensure and certification verifications, and management of service providers.

Response: The agency agrees, and has added §§41.225(l), 41.227(g), 41.229(e), and 41.231(h) to require a criminal conviction check and other eligibility qualifications for a contractor to be conducted and documented by the entity.

Comment: A commenter recommended that the agency subject all forms, related tools, and guidance materials used by individuals who choose the CDS option to the same formal public comment process established for rules. The commenter further recommended that the forms, related tools, and guidance materials include legal citations as recommended in HHSC's Rider 44 *Mental Retardation Services Report*, dated February 2005.

Response: The agency responds that while it may not subject forms, related tools, and guidance materials used in the CDS option to the public comment process used for rules, it will continue to consider stakeholder input when developing forms and materials. Regarding other forms and manuals, the agency responds that this comment is beyond the scope of these rules but will take the commenter's proposal under consideration. The rule language was not changed in response to the comment.

In addition, the agency has amended:

Section 41.101(7) to clarify that the chapter does not include sanctions;

Section 41.103(6) to clarify the term used in the rule is "budgeted unit rate."

Section 41.103(13) to state that an employee is a person employed by an employer and is paid an hourly wage;

Section 41.103(15) to clarify the definition of employer-agent;

Section 41.103(29) and (31) to correct language in the chapter;

Section 41.109(d) to correct the titles of referenced forms and to add Form 1586 to the list of forms that must be completed by an individual or LAR who decides to participate in the CDS option;

Section 41.111(b) to correct the reference to Subchapter D;

Section 41.201(a) to state that if an employer appoints a DR to assist with employer responsibilities, a criminal conviction check and a registry check must be completed and that the employer must terminate a DR if eligibility is not maintained;

Section 41.205(b)(2) to state that an employer who notifies a CDSA of a change in DR by telephone must fax or mail the required form to the CDSA;

Section 41.221(b)(1) to clarify that a corrective action plan requested in writing by a CDSA must be related to employer responsibilities;

Section 41.225(a), (f), (g), and (h) to state that in addition to an employee and a contractor, a DR must have a criminal history check performed;

Section 41.227(a) to state that an employer must comply with the section for each DR, and the employer or the DR must comply with the section for each applicant;

Section 41.233 to change the caption of the rule to "Management of Service Providers;"

Section 41.233(a) to replace the reference to an employee or contractor with a reference to a service provider;

Section 41.233(b) and (c) to remove annual anniversary information and to require an evaluation only in accordance to an individual's program requirements;

Section 41.235(b) to add a requirement that a vendor comply with any requirements of an individual's program;

Section 41.237(b) to delete references to "employer" and change them to "CDSA," as service agreements are required between the CDSA and the employer's service providers;

Section 41.239(e) to clarify that an employer or DR must sign a document after the last entry or correction is made by a service provider to approve the document for payment;

Section 41.241(b) to clarify that a documentation of services delivered must be approved as well as corrected;

Section 41.301(c) to state that a contracted CDSA must not provide FMS and case management services to the same individual, that the providers of FMS case management services must not be related by common ownership or control, and that DADS evaluates common ownership and control using 1 TAC §355.102(i).

Section 41.305(a) to add a requirement for a DR's criminal conviction check to be maintained by a CDSA;

Section 41.309(a)(6) to add that managing payroll includes depositing funds with appropriate agencies;

Section 41.309(11) to add that responding to a request for information is included in FMS;

Section 41.309(c) to clarify that an employer in this section is an individual or LAR;

Section 41.319(a) to state that a CDSA may require that the employer or DR develop a written corrective action plan related to employer responsibilities;

Section 41.321(a) to delete an incorrect reference to contractors;

Section 41.323(b) to require that a criminal conviction history check must not be dated more than 30 calendar days before a person assumes the status of a DR for an employer;

Section 41.323(f) to clarify that if a person has been convicted of a crime listed in THSC, §250.006, the CDSA must notify the employer or DR that the person must be terminated immediately as a DR or service provider;

Section 41.325(c) to clarify that if a DR has been listed in a required registry while serving as a DR, the employer must immediately terminate the appointment of the person as a DR.

Section 41.331 to clarify that an evaluation from an employer or DR is performed in accordance with an individual's program, not necessarily annually;

Section 41.337(c)(1) removes a reference to billing rules to clarify that a CDSA must pay in accordance with an individual's program;

Section 41.337(d)(6) to add that DADS does not pay for services, goods, or items delivered to an individual not eligible for them;

Section 41.337(e) to delete a reference to the CDSA's ability to bill for accrued funds at time of accrual;

Section 41.401 to reference a rule specific to enrollment processes in §41.109;

Section 41.401 to correct a reference to Form 1585 with a reference to Form 1584;

Section 41.401 to distinguish the five-day requirement for providing documentation for the CDSA for an applicant for the program and an individual determined eligible to receive program services;

Section 41.407(g)(3)(B) to correct a technical error;

Section 41.409(b)(3) to state that the section applies to suspension as well as termination;

Section 41.507(a) to clarify that services delivered by one or more employees are available for employer support services;

Section 41.507(a)(1)(C) to clarify that support consultation must be available in the individual's program for the service to be planned and budgeted;

Section 41.507(b) to revise the requirements concerning employer support services budgeting;

Section 41.507(f)(1) to add a reference to the spending limits to subsection (b) of this section;

Section 41.601(b)(2) and §41.603(a)(4)(B) to separate "CDSA" and "entity" to clarify that either may be used and that they are not the same; and

Section 41.601(d) to clarify that an employer or DR may budget and initiate support consultation services while an individual is participating in the CDS option.

Minor grammatical and technical corrections were made to the proposed text in §§41.107(a)(2), 41.207, 41.225, 41.227, 41.231, 41.309(h), 41.323, 41.327(b), and 41.339(e).

40 TAC §§41.101, 41.103, 41.105

The repeals are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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CHAPTER 41. CONSUMER DIRECTED SERVICES OPTION

SUBCHAPTER A. INTRODUCTION

40 TAC §§41.101, 41.103, 41.105, 41.107, 41.109, 41.111

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services; and Texas Human Resources Code, §32.066 which requires HHSC to establish a consumer-directed services program in which individuals enrolled in Medicaid waiver programs direct the delivery of program services.

§41.101. Introduction.

This chapter describes:

(1) the CDS option available to an individual or the individual's LAR;

(2) the process for the enrollment and participation of an individual in the CDS option;

(3) the responsibilities and requirements of an individual, LAR, or DR participating in the CDS option;

(4) the minimum qualifications for a person or entity providing services to an individual participating in the CDS option;

(5) the responsibilities and requirements of a person or entity providing services under the CDS option;

(6) the method of payment to a person or entity providing services to an individual participating in the CDS option; and

(7) the oversight applicable to a person or entity providing services under the CDS option.

§41.103. Definitions.

The following words and terms, when used in this chapter, have the following meanings unless the context clearly indicates otherwise:

(1) Adult--A person who is 18 years of age or older.

(2) Actively involved--Involvement with an individual that the individual's service planning team deems to be of a quality nature based on the following:

(A) observed interactions of the person with the individual;

(B) a history of advocating for the best interests of the individual;

(C) knowledge and sensitivity to the individual's preferences, values, and beliefs;

(D) ability to communicate with the individual; and

(E) availability to the individual for assistance or support when needed.

(3) Allowable cost--A billable service or item that is within the rate and spending limits of the rate established by the Health and Human Services Commission and that meets the requirements of an individual's program.

(4) Applicant--Depending on the context, an applicant is:

(A) a person applying for employment with an employer;

(B) a person or legal entity applying for a contract with an employer to deliver services to an individual; or

(C) a person applying for services through a DADS program.

(5) Budget--A written projection of expenditures for each program service delivered through the CDS option.

(6) Budgeted unit rate--The unit rate calculated for employee compensation (wages and benefits) in the budgeting process for services delivered through the CDS option. The rate is calculated after employer support services have been budgeted.

(7) Case manager--A person who provides case management services to an individual. The case manager assists an individual who receives program services in gaining access to needed services, regardless of the funding source for the services, and assists with other duties as required by the individual's program.

(8) CDS option--Consumer Directed Services option. A service delivery option in which an individual or LAR employs and retains service providers and directs the delivery of program services.

(9) CDSA--Consumer directed services agency. A provider contracting with DADS that provides FMS.

(10) Contractor--A person, such as a licensed or certified therapist, a licensed or registered nurse, or other professional, who has a service agreement with an employer to perform one or more program services as an independent contractor, rather than an employee of the employer or of an entity. A contractor may be a sole proprietor.

(11) DADS--The Department of Aging and Disability Services.

(12) DR--Designated representative. A willing adult appointed by the employer to assist with or perform the employer's required responsibilities to the extent approved by the employer.

(13) Employee--A person employed by an employer through a service agreement to deliver program services and is paid an hourly wage for those services.

(14) Employer--An individual or LAR who chooses to participate in the CDS option, and, therefore, is responsible for hiring and retaining service providers to deliver program services.

(15) Employer-agent--The Internal Revenue Service (IRS) designation of a CDSA as the entity responsible for specific activities and responsibilities required by the IRS on behalf of an employer in the CDS option.

(16) Entity--An organization that has a legal identity such as a corporation, limited partnership, limited liability company, professional association, or cooperative.

(17) Employer support services--Services and items the employer needs to perform employer and employment responsibilities, such as office equipment and supplies, recruitment, and payment of Hepatitis B vaccinations for employees and support consultation.

(18) FMS--Financial management services. Services delivered by the CDSA to an employer such as orientation, training, support, assistance with and approval of budgets, and processing payroll and payables on behalf of the employer.

(19) Individual--A person enrolled in a program.

(20) LAR--Legally authorized representative. A person authorized or required by law to act on behalf of an individual with regard to a matter described in this chapter, including a parent, guardian, managing conservator of a minor, or the guardian of an adult.

(21) Minor--A person who is 17 years of age or younger.

(22) Non-program resource--A resource other than an individual's program that provides one or more services or items.

(23) Parent--A natural, legal, foster, or adoptive parent of a minor.

(24) Program--A community services program administered by DADS.

(25) Service agreement--A written agreement or acknowledgment between two parties that defines the relationship and lists respective roles and responsibilities.

(26) Service area--A geographic area served by a program or specified in a contract with DADS.

(27) Service back-up plan--A documented plan to ensure that critical program services delivered through the CDS option are provided to an individual when normal service delivery is interrupted or there is an emergency.

(28) Service coordinator--An employee of a mental retardation authority who is responsible for assisting an applicant, individual, or LAR to access needed medical, social, educational, and other appropriate services, including DADS program services. A service coordinator provides case management services to an individual.

(29) Service plan--A document developed in accordance with rules governing an individual's program that identifies the program services to be provided to the individual, the number of units of each service to be provided, and the projected cost of each service.

(30) Service planning team--A group of people determined based on the requirements of an individual's program. Some DADS programs refer to the service planning team as an interdisciplinary team.

(31) Service provider--An employee, contractor, or vendor.

(32) Support advisor--A person who provides support consultation to an employer, or a DR, or an individual receiving services through the CDS option.

(33) Support consultation--An optional service that is provided by a support advisor and provides a level of assistance and training beyond that provided by the CDSA through FMS. Support consultation helps an employer to meet the required employer responsibilities of the CDS option and to successfully deliver program services.

(34) Vendor--A person selected by an employer or DR to deliver services, goods, or items, other than a direct service to an individual. Examples of vendors include a building contractor, electrician, durable medical equipment provider, pharmacy, or a medical supply company.

(35) Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

§41.105. Application.

This chapter applies to the following:

(1) an individual or LAR who elects to be the employer for services delivered through the CDS option;

(2) a DR;

(3) a CDSA;

(4) a support advisor;

(5) a service provider; and

(6) a case manager or service coordinator.

§41.107. Overview of the CDS Option.

(a) An individual or LAR may elect the CDS option if:

(1) the individual's program offers the CDS option;

(2) one or more program services in the individual's authorized service plan are available for delivery through the CDS option;

(3) the individual or LAR agrees to perform, or to appoint a DR to perform, the employer responsibilities required for participation in the CDS option;

(4) the individual or LAR selects a CDSA to provide FMS; and

(5) the individual or LAR has developed and received approval from the service planning team for each required service back-up plan.

(b) If an individual or LAR elects to participate in the CDS option, the individual or LAR:

(1) selects a CDSA to provide FMS;

(2) with the assistance of the CDSA, budgets funds allocated in the individual's service plan for delivery through the CDS option; and

(3) recruits, screens, hires, trains, manages, and terminates service providers.

(c) An individual or LAR, as the employer, may appoint in writing a willing adult as the DR to assist in performing employer responsibilities.

§41.109. Enrollment in the CDS Option.

(a) At the time of an individual's enrollment in a DADS program that offers the CDS option, and at least annually thereafter, a case manager, service coordinator, or other person designated by the individual's program must:

(1) provide written materials on the CDS option to the individual or LAR;

(2) meet with and provide the individual or LAR with an oral explanation of the CDS option specific to the individual's program; and

(3) complete Form 1581, Consumer Directed Services Option Overview.

(b) An individual or LAR may request that a case manager, service coordinator, or other person designated by the individual's program provide additional oral and written information to the individual or LAR regarding the CDS option or assist with enrollment in the CDS option at any time. The case manager, service coordinator, or designee must comply within five working days after receipt of the request.

(c) An individual or LAR declining participation in the CDS option may at any time elect to participate in the CDS option while receiving services through a DADS program that offers the CDS option.

(d) An individual or LAR who decides to participate in the CDS option must, with assistance from a case manager or service coordinator, complete the following forms:

(1) Form 1582, Consumer Directed Services Responsibilities;

(2) Form 1583, Employee Qualification Requirements;

(3) Form 1584, Participant Choice for Consumer Directed Services;

(4) Form 1585, Acknowledgement of Responsibility for Exemption from Nursing Licensure for Certain Services through Consumer Directed Services, or Form 1733, Employer and Employee Acknowledgement of Exemption from Nursing License for Certain Services Delivered through Consumer Directed Services, if required by the policies of the individual's program; and

(5) Form 1586, Acknowledgement of Information Regarding Support Consultation Services in the Consumer Directed Services (CDS) Option, if the service is available in the individual's program.

(e) An individual or LAR who elects to participate in the CDS option must complete the self-assessment in Form 1582, Consumer Directed Services Responsibilities, and if applicable, complete any assessment required by the individual's program.

(f) An individual or LAR who is not able to complete the self-assessment must appoint a DR in order to participate in the CDS option.

(g) The person appointed as the DR by the individual or LAR must:

(1) be willing to serve as the individual's or LAR's DR for participation in the CDS option;

(2) be or become actively involved with the individual; and

(3) complete the self-assessment in Form 1582, and any assessment required by the individual's program.

§41.111. Service Planning in the CDS Option.

(a) Service planning for an individual who chooses to participate in the CDS option is completed in accordance with the rules and requirements of the individual's program in the same manner as if ser-

vices are delivered through a program provider. Service planning includes:

(1) determining the individual's needs;

(2) determining service levels;

(3) justifying changes to the service plan;

(4) maintaining costs and cost ceilings;

(5) reviewing services; and

(6) obtaining approval for planned services.

(b) A case manager or service coordinator must adhere to rules and requirements of the individual's program and in Subchapter D of this chapter (relating to Enrollment, Transfer, Suspension, and Termination) if the individual's services or a request for services is recommended for:

(1) denial;

(2) reduction;

(3) suspension; or

(4) termination.

(c) A case manager or service coordinator must provide an oral explanation of an action recommended by a service planning team. The procedure for requesting a fair hearing must be provided orally and in accordance with the individual's program requirements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER B. RESPONSIBILITIES OF EMPLOYERS AND DESIGNATED REPRESENTATIVES

40 TAC §§41.201, 41.203, 41.205, 41.207, 41.209, 41.211, 41.213, 41.215, 41.217, 41.219, 41.221, 41.223, 41.225, 41.227, 41.229, 41.231, 41.233, 41.235, 41.237, 41.239, 41.241, 41.243

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services; and Texas Human Resources Code, §32.066 which requires HHSC to establish a consumer-directed services program in which individuals enrolled in Medicaid waiver programs direct the delivery of program services.

§41.201. Employer Responsibilities.

(a) If an employer appoints a DR to assist with employer responsibilities:

(1) a criminal conviction check must be completed on the person as described in §41.225 of this chapter (relating to Criminal Conviction History Checks);

(2) registry checks must be made as described in §41.227 of this chapter (relating to Required Registry Checks);

(3) the appointment of an eligible person must be documented by the employer on Form 1720, Appointment of a Designated Representative; and

(4) the appointment of a DR must be terminated if the DR does not maintain eligibility required in paragraphs (1) and (2) of this subsection.

(b) An employer or DR hires and is responsible and liable for a person, contractor, or vendor hired to deliver program services.

(c) An employer is responsible for:

(1) service planning with the individual's service planning team;

(2) budgeting allocated program funds in the individual's service plan for services to be delivered through the CDS option;

(3) determining compensation for service providers within the service rate and spending limits established by the Health and Human Services Commission;

(4) ensuring that employees and contractors are paid for services delivered based on an hourly rate;

(5) recruiting, screening, hiring, and training qualified employees;

(6) recruiting, screening, and retaining qualified contractors;

(7) managing and terminating service providers; and

(8) planning and arranging for back-up services.

(d) An employer or DR must hire or retain service providers in accordance with qualifications and other requirements of the individual's program.

§41.205. Employer Appointment of a Designated Representative.

(a) An employer may appoint a willing adult as a DR to assist or to perform employer responsibilities. The employer maintains responsibility and accountability for decisions and actions taken by the DR.

(b) If the employer chooses to appoint or change a DR, the employer must complete DADS Form 1720, Appointment of Designated Representative.

(1) The employer must notify a CDSA by fax or telephone within two working days after the appointment or change of a DR.

(2) If the employer notifies the CDSA by telephone, the employer must fax or mail a copy of Form 1720 to the CDSA within five working days after the appointment or change of a DR.

(c) If an employer decides to revoke the appointment of a DR, the employer must:

(1) complete DADS Form 1721, Revocation of Appointment of Designated Representative; and

(2) provide a copy of the completed form to the CDSA within two calendar days after the effective date of the revocation.

(d) Based on documentation provided by the CDSA of an employer's inability to meet employer responsibilities, the service planning team may recommend that the employer designate a DR to assist with or to perform employer responsibilities.

(e) A DR must not:

(1) sign or represent himself as the employer;

(2) be paid to perform employer responsibilities;

(3) be an employee of the employer;

(4) have a spouse employed by the employer; or

(5) provide a program service to the individual.

§41.207. Initial Orientation of an Employer.

Upon choosing to participate in the CDS option, an employer, and the DR, if applicable, must:

(1) complete the initial orientation provided by the CDSA in the residence of the individual;

(2) complete and maintain a copy of Form 1736, Documentation of Employer Orientation, upon completion of the orientation;

(3) complete Form 1735, Employer and Consumer Directed Services Agency Service Agreement, with the following required attachments:

(A) Form 1726, Relationship Definitions in Consumer Directed Services;

(B) as required by the individual's program, Form 1733, Employer and Employee Exemption from Nursing License for Certain Services, or Form 1585, Statement of Responsibilities for Consumer Directed Services; and

(C) Form 1738, Rules Acknowledgement;

(4) submit completed original forms specified in paragraph (3) of this section to the CDSA within five calendar days after the date of the initial orientation; and

(5) retain copies of completed documentation required by this section.

§41.221. Corrective Action Plans.

(a) A written corrective action plan may be required from an employer or DR if the employer or DR:

(1) hires an ineligible service provider;

(2) submits incomplete, inaccurate, or late documentation of service delivery;

(3) does not follow the budget;

(4) does not comply with program requirements related to the CDS option; or

(5) does not meet other employer responsibilities.

(b) An employer must provide written corrective action plans to the person requiring the plan within 10 calendar days after receiving the request. Corrective action plans may be requested in writing by:

(1) a CDSA, related to employer responsibilities;

(2) a case manager or service coordinator;

(3) a service planning team; or

(4) a DADS representative.

(c) A written corrective action plan must include:

(1) the reason the corrective action plan is required;

(2) the action to be taken;

(3) the person responsible for each action; and

(4) the date the action must be completed.

(d) An employer or DR may request assistance in the development or implementation of a corrective action plan from:

(1) the CDSA or others if the plan is related to employer responsibilities, as described in this subchapter;

(2) if applicable, the support advisor as described in Subchapter F of this chapter (relating to Support Consultation Services and Support Advisor Responsibilities); and

(3) the case manager, service coordinator, or others if the corrective action plan is related to program rules or requirements.

§41.225. Criminal Conviction History Checks.

(a) Before a DR can be appointed or an applicant can become an employee or contractor, an employer, or DR if for an applicant, must:

(1) obtain the DR's applicant's permission to conduct a criminal conviction background check from the Texas Department of Public Safety (DPS) using Form 1725, Criminal Conviction History and Registry Checks; and

(2) obtain a criminal conviction history check in one of the following ways:

(A) obtain the criminal conviction history check directly from the DPS Criminal History Conviction Database website available at https://records.txdps.state.tx.us/dps_web/APP_PORTAL/index.aspx;

(B) request that the CDSA obtain the criminal conviction history check directly from the DPS Criminal History Conviction Database website; or

(C) request that the DR or applicant obtain the criminal conviction history check directly from the DPS Criminal History Conviction Database website.

(b) Before hiring or retaining a DR or applicant, an employer or DR must:

(1) submit a copy of the person's criminal conviction history check if obtained by the employer, DR, or the applicant; or

(2) receive a copy of the DPS report from the CDSA if obtained by the CDSA.

(c) A criminal conviction history check must be dated no more than 30 calendar days before the first date the applicant provides services to the individual.

(d) An employer, or DR, if not for an applicant, must not hire or retain a DR or applicant who:

(1) refuses to provide consent for a DPS criminal conviction history check; or

(2) has a criminal conviction history that indicates the person has been convicted of a crime included in Texas Health and Safety Code (THSC), §250.006 (relating to Convictions Barring Employment).

(e) If a DR or applicant has a criminal conviction history that does not include the conviction of a crime listed in THSC, §250.006, the CDSA must document that the employer, and DR if for an applicant, were informed in writing that the DR or applicant:

(1) has a history of at least one criminal conviction;

(2) has no conviction listed in the THSC, §250.006; and

(3) may be hired or retained for service delivery at the discretion of the employer.

(f) An employer and the CDSA must retain the original or a copy of each criminal conviction history check for each DR, employee, and contractor in accordance with record retention requirements described in §41.243 of this chapter (relating to Record Retention).

(g) An employer or DR may at any time obtain or request that the CDSA obtain an updated criminal conviction history check on a DR, current employee, or contractor.

(h) An employer must immediately terminate a DR, employee, or contractor if an updated criminal conviction history check indicates that the person has been convicted of a crime included in THSC, §250.006.

(i) If budgeted, the actual cost of a criminal conviction history check is paid as an employer support service expenditure:

(1) to the CDSA, if the criminal conviction history check was obtained by the CDSA;

(2) to the employer or DR, if the criminal conviction history check was obtained by the employer or DR; or

(3) to the applicant, if the criminal conviction history was obtained by the applicant.

(j) An employer or DR may conduct, or request that the CDSA conduct, a check of the applicant's background using the DPS Sex Offender Registry at https://records.txdps.state.tx.us/soSearch/default.cfm.

(k) A CDSA must, if requested by the employer or DR:

(1) conduct a check of the DPS Sex Offender Registry; and

(2) inform the employer of the results of the check by providing a copy of the results to the employer or DR.

(l) When contracting with an entity, the employer and the entity must complete a service agreement in which the entity certifies that the entity has checked and verified that each person delivering a service to the individual on behalf of the entity is in compliance with, and will maintain compliance with, this section.

§41.227. Required Registry Checks.

(a) An employer must, for each DR, and an employer or the DR must, for each applicant for employment, contractor, or person delivering services to an individual on behalf of a contracted entity:

(1) obtain the DR's or applicant's written permission on Form 1725, Criminal Conviction History and Registry Checks, to conduct a required check of the DADS Nurse Aide Registry and the Employee Misconduct Registry; and

(2) obtain a check of the registries or request that the CDSA obtain and document the check by calling 1-800-452-3934.

(b) An employer, DR, or CDSA must document the results of a registry check for an applicant using Form 1725. The result of a registry check must be obtained within 30 calendar days before the first date the applicant provides services to the individual.

(c) An employer must not employ or retain a DR or applicant, and must immediately discharge a DR or employee or contractor, upon verification that:

(1) the person is listed as revoked in the Nurse Aide Registry; or

(2) the person is listed as unemployable in the Employee Misconduct Registry.

(d) An employer must obtain and maintain a copy of completed Form 1725 documenting the results of the registry checks.

(e) An employer must provide a copy of each completed Form 1725 to the CDSA.

(f) An employer and the CDSA must maintain a copy of each completed Form 1725.

(g) When contracting with an entity, the employer and the entity must complete a service agreement in which the entity certifies that the entity has checked and verified that each person delivering a service to the individual on behalf of the entity is in compliance with, and will maintain compliance with, this section.

§41.229. Licensure and Certification Verification.

(a) An employer or DR must, for each service that requires a service provider to be licensed, certified, or have other official or legal permission to perform a specific service:

(1) obtain and retain a copy or other documentation on file to verify the current status of the applicant's license, certification, or other permission; and

(2) submit a copy of the document verifying current status to the CDSA.

(b) An employer or DR must:

(1) obtain and retain documentation while the service provider is providing services to verify that the service provider's license, certification, or other legal or official permission is maintained; and

(2) provide documentation to the CDSA within 30 calendar days after the renewal date of the service provider's license, certification, or other permission.

(c) If applicable, the employer or DR must obtain a copy from the service provider of:

(1) the current complaint procedure for each of the service provider's authorities; and

(2) the service provider's professional liability insurance coverage.

(d) An employer is responsible for services delivered by the service provider prior to the employee receiving verification of a service provider's eligibility in writing from the CDSA.

(e) When contracting with an entity, the employer and the entity must complete a service agreement in which the entity certifies that the entity has checked and verified that each person delivering a service to the individual on behalf of the entity is in compliance with, and will maintain compliance with, this section.

§41.231. Verification of Eligibility of an Employee or Contractor.

(a) When an applicant is hired, the employer or DR must ensure that the applicant completes Form 1724, New Service Provider Packet Cover Sheet, and supplies any required support documentation before being employed or retained by the employer or DR for the delivery of services to the individual. The employer or DR must provide Form 1724 to the CDSA.

(b) An employer or DR must:

(1) withdraw an offer of employment if a person is not eligible for employment based on results of US Citizenship and Immigration Services, Form I-9, Employment Eligibility Verification or regulations of any government agency;

(2) verify continued eligibility of employment based on the requirements of the US Citizenship and Immigration Services using Form I-9, Employment Eligibility Verification;

(3) maintain a copy of renewed supporting documents; and

(4) submit a copy of renewed supporting documentation to the CDSA.

(c) An employer or DR must immediately terminate an employee or contractor that does not maintain eligibility to:

(1) be employed or retained; or

(2) provide the service or services to an individual.

(d) If an employee or contractor is permitted, by program rule or with employer approval, to transport the individual, the employer or DR must obtain, maintain, and update copies of the employee's or contractor's:

(1) current Texas Driver License; and

(2) current proof of minimum auto insurance as required by the State of Texas.

(e) An employer or DR may obtain additional background or reference checks on applicants, employees, and contractors. Charges for the costs of background or reference checks must be in the individual's approved budget before the expense is incurred, if the expense will be paid through the individual's budget.

(f) If an applicant that has previously been terminated by the employer is being considered as a service provider through the CDS option, the employer or DR must determine eligibility in the same manner as required for a new employee or a new contractor.

(g) An employer or DR must obtain written notice from the CDSA that an applicant, employee, or contractor is eligible to be hired, retained, or maintained for service delivery before services are delivered.

(h) When contracting with an entity, the employer and the entity must complete a service agreement in which the entity certifies that the entity has checked and verified that each person delivering a service to the individual on behalf of the entity is in compliance with, and will maintain compliance with, this section.

§41.233. Management of Service Providers.

(a) An employer or DR must document management activities of a service provider on Form 1732, Service Provider Management, including:

(1) initial orientation if required by the individual's program; and

(2) ongoing management activities if performed by the employer or DR.

(b) When required by the individual's program, the employer or DR must, for each employee and contractor, complete an evaluation of the employee's or contractor's job performance and an evaluation of satisfaction by the individual receiving services and by the individual's LAR on:

(1) the form required by the individual's program; or

(2) Form 1732, Service Provider Management, when a program form is not required.

(c) An employer or DR must mail or fax a copy of completed Form 1732 for each annual evaluation required in subsection (b) of this section to the CDSA within 14 calendar days after the due date required by the individual's program.

§41.235. Verification of Eligibility for Vendors.

(a) An employer or DR must:

(1) obtain, verify, and retain documentation that a vendor meets and maintains the eligibility requirements of an individual's program for the services to be delivered; and

(2) submit documentation of the vendor's eligibility and continued eligibility to the CDSA before services are delivered.

(b) A vendor must be in compliance with any requirements of law or of the individual's program, including:

(1) applicable licensing or certification standards;

(2) local building codes;

(3) the Americans with Disabilities Act of 1990 as amended; and

(4) state requirements for automotive adaptive equipment and vehicle modifications.

(c) An employer or DR must obtain written approval from the CDSA that a vendor has met the requirements detailed in subsection (a) of this section before the vendor delivers services to the individual.

§41.237. Service Provider Agreements.

(a) An employer or DR must, before an employee, contractor, or vendor provides services to an individual, ensure that required DADS service agreements have been completed between:

(1) the employer and the employee;

(2) the employer and the contractor; and

(3) the employer and a vendor, if required by DADS.

(b) An employer must assist the CDSA in obtaining the required DADS service agreement form between:

(1) the CDSA and the employee;

(2) the CDSA and individual contractor or entity contactor; and

(3) the CDSA and a vendor, if required by DADS.

(c) An employer must ensure that the CDSA receives the completed service agreement described in subsection (b) of this section.

(d) A CDSA must not make payment to a service provider until the completed service agreement is received.

§41.239. Documentation of Services Delivered.

(a) An employer or DR must ensure that documentation of services delivered includes:

(1) each element required by an individual's program; and

(2) service dates within the same calendar month.

(b) Documentation must include:

(1) time sheets for employees;

(2) time sheets or invoices for contractors;

(3) invoices for vendors;

(4) receipts when payment has been made for a service; and

(5) other documentation in accordance with requirements of the individual's program.

(c) An employer or DR must review documentation of services delivered and obtain corrections or revisions before submitting the document to the CDSA for payment.

(d) The person making an error or omission on a document of services delivered must:

(1) enter the omission; and

(2) for an error, make correction by:

(A) making one line through the error;

(B) entering the correction; and

(C) initialing and dating the correction.

(e) To approve the document for payment, the employer or DR must sign and date the document after the last entry or correction made by the service provider.

§41.241. Payment of Services.

(a) An employer or DR must submit to the CDSA approved documentation of services delivered for payment on or before the due date established by the CDSA.

(b) An employer or DR must obtain a correction and submit the corrected and approved documentation of services delivered to the CDSA within three calendar days after notice from the CDSA.

(c) Only the employer or DR may approve a document submitted to the CDSA for payment.

(d) If a document is submitted electronically to the CDSA, the employer or DR must also submit a copy of the document, signed and dated by the service provider and the employer or DR, to the CDSA, by fax or United States mail. The CDSA does not pay for future services delivered by the service provider until receipt of the approved document.

(e) Overtime pay for employees must be calculated and paid in accordance with current state or federal laws and regulations for payment of overtime.

(f) DADS does not pay, and the CDSA must not pay, for purchases that:

(1) are not in an approved budget at time of purchase;

(2) do not meet requirements for payment through the individual's program or this chapter;

(3) are provided by a service provider:

(A) before the CDSA provides written approval of the service provider's eligibility to deliver the service, even if the CDSA determines later that the service provider was eligible to deliver the service;

(B) while the service provider was not eligible to deliver services because the service provider did not have a valid license, certificate, or other formal permission to provide the service or failed to meet other qualifications for service delivery; or

(C) when the service provider's relationship to the employer, individual, or DR is prohibited for service delivery;

(4) are delivered when the individual receiving services is not eligible for services at the time of service delivery;

(5) are available through a non-program resource;

(6) are available through another service within the individual's program;

(7) do not meet:

(A) the needs of the individual;

(B) the employment-related requirements; or

(C) the employer-related responsibilities; or

(8) exceed the rate or amount approved for the service.

(g) If the employer or DR does not meet an employer responsibility or due date, DADS does not pay and the CDSA must not pay related finance charges, interest, and fees.

§41.243. Record Retention.

(a) An employer must, for at least five years after services are delivered through the CDS option, maintain documentation required by:

(1) this chapter;

(2) the individual's program; or

(3) government agencies with regulatory authority over employer and employer-agent responsibilities.

(b) An employer must retain documentation of:

(1) services delivered to an individual through the CDS option;

(2) payments by the CDSA to service providers;

(3) service provider qualifications;

(4) employer responsibilities;

(5) employer-agent responsibilities; and

(6) contracts, service agreements, and required supporting documentation.

(c) An employer must maintain all documentation:

(1) until all litigation or claims are resolved, if any litigation or claim involving these records is ongoing, regardless of the five-year period; and

(2) in accordance with the regulating government agency's requirement for specific documentation when the record retention requirement is more than five years.

(d) An employer must allow representatives of DADS and other appropriate government agencies to examine and copy records during normal business hours and days.

(e) DADS may take adverse action if the employer fails to maintain records as required or to provide records upon request.

(f) An employer must ensure confidentiality and security of all records.

(g) If records are discarded, the employer must ensure confidentiality and security of the information.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
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SUBCHAPTER C. ENROLLMENT AND RESPONSIBILITIES OF CONSUMER DIRECTED SERVICES AGENCIES

40 TAC §§41.301, 41.303, 41.305, 41.307, 41.309, 41.311, 41.313, 41.315, 41.317, 41.319, 41.321, 41.323, 41.325, 41.327, 41.329, 41.331, 41.333, 41.335, 41.337, 41.339

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services; and Texas Human Resources Code, §32.066 which requires HHSC to establish a consumer-directed services program in which individuals enrolled in Medicaid waiver programs direct the delivery of program services.

§41.301. Contracting as a Consumer Directed Services Agency.

(a) DADS contracts with a person to be a CDSA in accordance with Chapter 49 of this title (relating to Contracting for Community Care Services). A CDSA provides FMS and, when requested by an individual or LAR participating in the CDS option, support consultation services.

(b) Before contracting with DADS as a CDSA, an applicant must:

(1) have at least one person employed by the CDSA attend and complete required CDSA training provided or authorized by DADS; and

(2) have at least one eligible employee or contractor to provide support consultation services as defined in Subchapter F of this chapter (relating to Support Consultation Services and Support Advisor Responsibilities).

(c) A contracted CDSA must not provide FMS and case management services to the same individual. A provider of one service must not be a related party for common ownership or control of the provider of the other service. DADS evaluates common ownership and control using 1 TAC §355.102(i).

§41.305. Appointment of a Designated Representative.

(a) A CDSA must maintain the following documentation regarding an employer's DR:

(1) Form 1725, Criminal History and Registry Check, and the Criminal Conviction History Report from DPS;

(2) Form 1720, Appointment of a Designated Representative, for:

(A) initial designations; and

(B) any change to an appointment of a DR; and

(3) Form 1721, Revocation of Representative, if the employer elects to participate in the CDS option without the use of a DR.

(b) A CDSA must communicate with and accept direction from the employer's DR to the extent delegated by the employer on Form 1720.

§41.309. Financial Management Services and Employer-Agent Responsibilities.

(a) A CDSA must provide FMS to an employer or DR, including:

(1) providing initial orientation as described in §41.307 of this chapter (relating to Initial Orientation of an Employer);

(2) providing ongoing training, assistance, and support for employer-related responsibilities;

(3) verifying qualifications of applicants before services are delivered;

(4) monitoring continued eligibility of service providers;

(5) approving and monitoring budgets for services delivered through the CDS option;

(6) managing payroll, including calculations of employee withholdings and employer contributions and depositing these funds with appropriate agencies;

(7) complying with applicable government regulations concerning employee withholdings, garnishments, mandated withholdings, and benefits;

(8) preparing and filing required tax forms and reports;

(9) paying allowable expenses incurred by the employer;

(10) providing status reports concerning the individual's budget, expenditures, and compliance with CDS option requirements; and

(11) responding to the employer or DR as soon as possible, but at least within two working days after receipt of information requiring a response from the CDSA, unless indicated otherwise in this chapter.

(b) A CDSA must obtain employer-agent status with the Internal Revenue Service, the Texas Workforce Commission, and any other appropriate government agencies within the time frame established by each agency.

(c) The CDSA must perform all required employer-agent responsibilities required by government agencies that regulate the relationship between the employer-agent (the CDSA) and the employer

(the individual or the LAR) and maintain an original or a copy of each form required to document compliance.

(d) The CDSA must:

(1) maintain a copy of required forms and reports that the CDSA files with or receives from government agencies; and

(2) within 30 calendar days after receipt, provide a copy of each form and report to the employer.

(e) The CDSA must enter into a service agreement provided by DADS with each of the employer's service providers before issuing the initial payment for services to the service provider.

(f) The CDSA must accept the designated portion of the program service rate or a designated fee established by the Health and Human Services Commission as payment in full for FMS delivered.

(g) The CDSA must maintain originals or copies of records to document compliance with this section.

(h) The CDSA must not provide FMS and case management services to the same individual in accordance with §41.301 of this chapter (Contracting as a Consumer Directed Services Agency).

§41.319. Corrective Action Plans.

(a) A CDSA may require that the employer or DR develop a written corrective action plan related to employer responsibilities, such as:

(1) an ineligible service provider is hired or retained for service delivery;

(2) documentation of service delivery is incomplete, inaccurate, or late;

(3) the budget has not been followed;

(4) the rules in this chapter have not been followed; or

(5) other employer responsibilities are not followed.

(b) If requested by an employer or DR, a CDSA must assist the employer or DR in the development and implementation of a corrective action plan related to employer responsibilities in the CDS option. A corrective action plan must include:

(1) the reason the corrective action plan is required;

(2) the action to be taken;

(3) the person responsible for the action; and

(4) the date the action must be completed.

§41.321. Liability Acknowledgment and Workers' Compensation.

(a) A CDSA must verify that an applicant for employment has completed, signed, and dated Form 1728, Liability Acknowledgment, before approving the applicant for hire by the employer.

(b) A CDSA must assist an employer if requested to obtain coverage for employee work-related injuries, including:

(1) workers' compensation through the Texas Department of Insurance, Division of Workers Compensation; or

(2) other options listed on Form 1728.

§41.323. Criminal Conviction History Check.

(a) The Texas Department of Public Safety (DPS) criminal conviction history check must be acquired directly from the DPS Criminal History Conviction Database website available at https://records.txdps.state.tx.us/dps_web/APP_PORTAL/index.aspx.

(b) The criminal conviction history check must not be dated more than 30 calendar days before:

(1) a person assumes the status of a DR for an employer; and

(2) the first date the applicant provides services.

(c) The CDSA must receive the criminal history check from the employer, DR, or applicant. If requested by the employer or DR on Form 1725, Criminal Conviction History and Registry Checks, the CDSA must obtain the DPS criminal conviction history check within two working days after the request and provide a copy to the employer or DR.

(d) The CDSA must review the criminal conviction history on each applicant and notify the employer or DR in writing that the applicant:

(1) does not have a criminal conviction and the applicant may be hired or retained at the discretion of the employer or DR;

(2) has one or more criminal convictions that are not listed in Texas Health and Safety Code (THSC), §250.006 (relating to Convictions Barring Employment) and the applicant may be hired or retained at the discretion of the employer or DR; or

(3) has one or more criminal convictions listed in THSC, §250.006 (relating to Convictions Barring Employment) and the applicant must not be hired or retained.

(e) The CDSA must maintain a copy of:

(1) the criminal conviction history check for each applicant hired or retained by the employer; and

(2) the written notice provided to the employer or DR for each applicant that is:

(A) hired or retained by the employer; and

(B) not hired or retained by the employer.

(f) The CDSA must obtain an updated criminal conviction history check for a service provider, if requested by the employer or DR. If the results of the updated check indicate the person has been convicted of a crime listed in THSC, §250.006, the CDSA must notify the employer or DR that the person must be terminated immediately as a service provider.

(g) The cost of a criminal conviction history check and other background checks, if budgeted, is paid as an employer support service expenditure at actual cost noted on the receipt to the person or entity that purchased the DPS criminal conviction history check.

(h) If the employer or DR requests that the CDSA check the DPS Sex Offender Registry, the CDSA must inform the employer of the results of the check and provide a copy of the results to the employer or DR.

§41.327. Verification of Applicants for Employees, Contractors, and Vendors.

(a) For each applicant for delivery of services through the CDS option as an employee, a contractor, or as a vendor, the CDSA must:

(1) obtain and review documentation from the employer, DR, or applicant that is required to verify each required qualification of the applicant;

(2) notify the employer or DR of required documentation not received;

(3) notify the employer or DR in writing within three working days after receipt of all required documentation that the applicant

is, or is not, qualified to be hired or retained for delivery of the specific service or services; and

(4) retain documentation on file if the applicant is hired or retained by the employer or DR for service delivery.

(b) The CDSA must review documentation provided by the employer, DR, applicant, or service provider, to determine if the applicant or service provider meets eligibility requirements of the individual's program and government regulations to deliver an intended service and that the planned service meets those requirements. The required documentation may include:

(1) license or certification;

(2) official or legal permission;

(3) local building codes;

(4) Americans with Disabilities Act of 1990 as amended; and

(5) requirements for automotive adaptive equipment and vehicle modifications.

(c) The CDSA must not pay for services delivered if the CDSA has not provided written notice to the employer or DR of the service provider's eligibility even if the service provider is determined later by the CDSA to be eligible.

(d) The CDSA must pay, but not claim reimbursement through DADS, for services delivered if the CDSA notified the employer or DR in error that the applicant was eligible.

(e) If an applicant has previously been terminated by the employer or DR, the employer or DR and the CDSA must complete the eligibility process as a new applicant.

§41.337. Payment of Services.

(a) A CDSA must make payments in accordance with posted pay dates and required time frames unless delay is documented by the CDSA as being caused by an employer, DR, or service provider.

(b) A CDSA approves and pays for purchases through the CDS option only if:

(1) documentation provided is in accordance with §41.239 of this chapter (relating to Documentation of Services Delivered) and §41.335 of this chapter (relating to Documentation of Services Delivered); and

(2) services, goods, or items documented are included in the approved budget before purchase.

(c) A CDSA must pay only:

(1) the actual hours and minutes of service in accordance with the individual's program;

(2) the actual cost of the service or item, not to exceed the established budget unit rate or amount for the service;

(3) the budgeted employee benefits accrued based on hours worked by employees; and

(4) purchases of services and items if funds have been accrued based on units delivered.

(d) A CDSA must not request payment from DADS, and DADS does not pay, for services, goods, or items that:

(1) include finance charges, interest, or assessed late fees or charges;

(2) services, goods, or items that are delivered by a service provider who:

(A) was not approved in writing by the CDSA before service delivery, even if the CDSA determines later that the service provider was eligible to deliver the service; or

(B) was not eligible to provide the service at the time of delivery;

(3) are available through another service within the individual's program;

(4) are available through a non-program resource;

(5) are not included in an approved budget before purchase or delivery of the service or item; or

(6) the individual was not eligible for.

(e) A CDSA must bill accrued funds either at the time the funds are paid or deposited by the CDSA.

(f) A CDSA must make billing adjustments:

(1) for payments received that:

(A) have not been paid by the CDSA; and

(B) are not due from the CDSA; and

(2) when:

(A) the service plan period ends;

(B) the individual transfers to another CDSA; or

(C) the individual terminates the CDS option.

(g) A CDSA must ensure that payment of overtime pay for employees is calculated and paid in accordance with current state and federal laws and regulations for payment of overtime.

(h) A CDSA must receive a copy of the documentation of services delivered dated by the service provider and the employer or DR before issuing a subsequent payment to the employee when the previous payment was based on a time sheet received in an electronic format through e-mail.

§41.339. Record Retention.

(a) A CDSA must create and retain records in accordance with:

(1) the contract between the CDSA and DADS;

(2) Chapter 49 of this title (relating to Contracting for Community Care Services);

(3) this chapter;

(4) requirements of the individual's program;

(5) applicable government agencies' requirements; and

(6) the CDSA's record keeping and record retention policy.

(b) A CDSA must maintain financial records that include the following information to support claims billed to DADS and payments received from DADS:

(1) the amount of payment;

(2) the voucher number;

(3) the warrant number; and

(4) the date the payment was received.

(c) A CDSA must document and maintain financial records in accordance with generally accepted accounting principles (GAAP) and DADS requirements, including:

(1) deposit slips, bank statements, cancelled checks, and receipts;

(2) purchase orders;

(3) invoices;

(4) journals and ledgers;

(5) time sheets, payroll, and tax records;

(6) records, forms, and reports required by the Internal Revenue Service, the Texas Workforce Commission, and other applicable government agencies;

(7) insurance coverage, claims, and payments (for example, medical, liability, fire and casualty, and workers' compensation) as a DADS contracted provider (the CDSA) and as applicable for individuals;

(8) equipment inventory records;

(9) the CDSA's internal accounting procedures;

(10) chart of accounts; and

(11) the individual's program policies and procedures.

(d) A CDSA must keep records:

(1) for at least five years and, if any litigation or claim involving records is ongoing at the conclusion of five years, the CDSA must maintain the records until all litigation or claims are resolved; or

(2) for a longer period than five years if required by an applicable government agency.

(e) A CDSA must allow representatives of DADS or other appropriate government agencies, to examine and copy records during normal business days and hours and for reasonable periods.

(f) A CDSA must ensure confidentiality and security of all records.

(g) If records are discarded, a CDSA must ensure confidentiality and security of the information.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
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Department of Aging and Disability Services
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SUBCHAPTER D. ENROLLMENT, TRANSFER, SUSPENSION, AND TERMINATION

40 TAC §§41.401, 41.403, 41.405, 41.407, 41.409

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services; and Texas Human Resources Code, §32.066 which requires HHSC to establish a consumer-directed services program in which individuals enrolled in Medicaid waiver programs direct the delivery of program services.

§41.401. Enrollment Process.

The enrollment process is conducted in accordance with §41.109 of this chapter (relating to Enrollment in the CDS Option). Within five working days after receipt of a completed Form 1584, Consumer Participation Choice, by an eligible individual or LAR, or upon receipt of Form 1584 and within five working days after eligibility determination for an applicant applying for program services, a case manager or service coordinator must provide the following documentation to the CDSA:

(1) Form 1584;

(2) the individual's authorized service plan;

(3) the individual's plan of care; and

(4) if not provided in paragraph (1)-(3) of this section:

(A) the date the employer may begin incurring expenses to initiate start-up activities and to incur recruitment and hiring expenses;

(B) the date the employer may begin delivery of program services through the employer's service providers;

(C) the number of units, the approved rate, or the amount authorized in the individual's service plan for each service to be delivered through the CDS option;

(D) the total funds authorized for each program service to be delivered through the CDS option; and

(E) the authorized schedule of service delivery per day, week, month, or other time frame specific to the service.

§41.409. Re-enrollment for Participation in the CDS Option.

(a) Following suspension or termination of participation in the CDS option, an individual or LAR must request re-enrollment in the CDS option by notifying the individual's case manager or service coordinator.

(b) If an individual or LAR wishes to re-enroll in the CDS option, the case manager or service coordinator must:

(1) review the reason that the individual was suspended or terminated from the CDS option;

(2) verify that the individual has fulfilled the minimum 90-day period and any conditions specified by the individual's service planning team or a hearing officer, if applicable;

(3) verify how each issue that contributed to the suspension or termination has been resolved; and

(4) refer the request for re-enrollment in the CDS option to the individual's service planning team and follow requirements of the individual's program, including:

(A) revising the individual's service plan and re-enrolling the individual in the CDS option upon approval; and

(B) issuing a denial and providing information related to requesting a fair hearing if the request is not approved.

(c) If approved for re-enrollment, the CDSA must:

(1) provide an initial orientation in accordance with §41.307 of this chapter (relating to Initial Orientation of an Employer) following the individual's re-enrollment in the CDS option if the current employer or DR has not received initial orientation; and

(2) notify the employer, DR, and the individual's case manager or service coordinator in writing within two working days after any repeat of prior noncompliance or additional noncompliance with requirements of the individual's program or this chapter during the individual's participation in the CDS option.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER E. BUDGETS

40 TAC §§41.501, 41.503, 41.505, 41.507, 41.509, 41.511

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services; and Texas Human Resources Code, §32.066 which requires HHSC to establish a consumer-directed services program in which individuals enrolled in Medicaid waiver programs direct the delivery of program services.

§41.507. Employer Support Services Budgeting.

(a) An employer or DR may budget, through those services that are delivered by one or more employees in the CDS option:

(1) employer support services, including:

(A) employment-related expenses, as described in subsection (d) of this section;

(B) employer-related expenses, as described in subsection (e) of this section; and

(C) support consultation services, as described in subsection (f) of this section when available in the individual's program; and

(2) start-up expenses that must be:

(A) budgeted for purchases projected before the delivery of services through the CDS option; and

(B) accrued from the budgeted unit rate for services scheduled for delivery through the CDS option within the first three months of initiation of the CDS option.

(b) An employer or DR:

(1) may budget up to 10 percent of the amount available, after the CDSA portion is calculated, in those services delivered by one or more employees;:

(2) must not budget more than $600 annually or more than $50 per month if less than 12 months remain in the service plan for employer support services, including:

(A) employment-related expenses; and

(B) employer-related expenses;

(3) must not budget more than the remaining amount of the 10 percent maximum for support consultation services; and

(4) may budget any remaining amount in the affected program service for employee compensation.

(c) An employer or DR must, for funds remaining in employer support services, budget the remaining funds to:

(1) employee compensation (wages and benefits); or

(2) with approval of the individual's service planning team, support consultation services in accordance with subsection (f) of this section and Subchapter F of this chapter (relating to Support Consultation Services and Support Advisor Responsibilities).

(d) An employer or DR may budget allowable, necessary, and reasonable employment-related services, goods, or items, including:

(1) recruiting expenses;

(2) criminal conviction history checks from the Texas Department of Public Safety;

(3) acquiring other background checks of a potential service provider;

(4) purchased employee job-specific training;

(5) cardio-pulmonary resuscitation training;

(6) first-aid training;

(7) Hepatitis B vaccination if elected by an employee;

(8) supplies required for an employee or provider of the service to perform a task, if not available through the individual's program or other source and the purchase is allowable through the individual's program;

(9) non-taxable employee benefits; and

(10) services, goods, and items specifically approved by the individual's program as an employer support service or included in Appendix XI, Allowable and Non-Allowable Expenditures, in the *Consumer Directed Services Handbook* available at http://www.dads.state.tx.us/handbooks/CDS/appendix/XI/index.htm.

(e) An employer or DR may budget employer-related services, goods, or items required to meet employer responsibilities, including:

(1) basic office equipment, which may include a basic fax machine for the purpose of submitting documents to the CDSA;

(2) mailing costs;

(3) expenses related to making copies;

(4) file folders and envelopes; and

(5) services, goods, and items specifically approved by the individual's program as an employer support service or included in Appendix XI, Allowable and Non-Allowable Expenditures, in the *Consumer Directed Services Handbook*.

(f) If support consultation services are approved by the individual's service planning team, the employer or DR must budget the service within the spending limits in subsection (b) of this section for employer support services and obtain approval of the budget from the CDSA before implementation of the service.

(g) An employer or DR must, before requesting additional funds available for support consultation:

(1) provide the individual's case manager or service coordinator with justification for the specific services requested through support consultation;

(2) verify with the case manager or service coordinator the availability of non-program resources for the requested service; and

(3) obtain approval from the individual's service planning team for additional funds for support consultation in accordance with subsection (h) of this section.

(h) If the service planning team approves additional funds for support consultation, the team must reallocate funds within the individual's service plan without increasing the total cost of the individual's service plan.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. SUPPORT CONSULTATION SERVICES AND SUPPORT ADVISORY RESPONSIBILITIES

40 TAC §§41.601, 41.603, 41.605

The new sections are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services; and Texas Human Resources Code, §32.066 which requires HHSC to establish a consumer-directed services program in which individuals enrolled in Medicaid waiver programs direct the delivery of program services.

§41.601. Support Consultation Services.

(a) Support consultation, if available through the individual's program, is an optional service available to an individual participating in the CDS option. Support consultation is delivered to:

(1) an employer;

(2) an employer's DR; or

(3) an individual receiving services through the CDS option if that individual will be the employer within six months of the initiation of support consultation services to the individual.

(b) Support consultation is provided by a person who meets the qualifications of a support advisor. A support advisor may be:

(1) a contractor of the employer; or

(2) an employee or contractor of:

(A) a CDSA; or

(B) another entity.

(c) Support consultation must provide:

(1) a level of training, assistance, and support that does not duplicate or replace the services delivered through FMS, case management services, or other available program or non-program service or resource;

(2) practical skills training and assistance to successfully manage service providers for authorized program services delivered through the CDS option; and

(3) skills training and assistance for:

(A) recruiting, screening, and hiring workers;

(B) developing and documenting job descriptions;

(C) verifying employment eligibility and qualifications;

(D) completing documents required to:

(i) employ an individual;

(ii) retain a contractor or vendor; and

(iii) manage service providers;

(E) communicating effectively, solving problems, and documenting employer responsibilities in the CDS option;

(F) developing, revising, and implementing service back-up plans;

(G) performing employer responsibilities;

(H) complying with the individual's program and this chapter; and

(I) developing ongoing decision making skills for employer-related and employment-related situations.

(d) An employer or DR may budget and initiate support consultation services while the individual is participating in the CDS option. Before initiation of the service, the employer or DR must:

(1) identify the person or persons (the employer, the DR, or the individual within six months after becoming the employer) to receive the service and establish goals specific to the service;

(2) obtain approval of the goals established for the service from the individual's service planning team;

(3) develop a budget for support consultation; and

(4) obtain approval of the budget from the CDSA.

(e) An employer or DR, a case manager or service coordinator, a CDSA, or a DADS representative may recommend that the individual's service planning team approve support consultation services for an individual if:

(1) the individual receiving services through the CDS option will become the employer within six months after the service is initiated;

(2) the employer or DR demonstrate a need for the service;

(3) the individual's health and welfare may regress without additional support for managing and directing service providers; or

(4) other reasons that the service planning team has determined justify the need for the service.

(f) If the individual's service planning team authorizes support consultation, the team must:

(1) approve the funds, the duration, and the frequency of the service;

(2) assist with development of goals and ensure that the activities required to meet the goals through support consultation comply with this chapter;

(3) approve the goals for support consultation and the person or persons who will receive the service (the individual, employer, or DR); and

(4) terminate the service when goals are met.

§41.603. Support Advisor Qualifications.

(a) A person must meet the following qualifications to be eligible to deliver support consultation as a support advisor:

(1) be:

(A) at least 18 years old;

(B) a high school graduate or posses certification of equivalency; and

(C) a person who does not provide a program service to the individual, other than support consultation and FMS through the CDS option;

(2) have documentation of attendance and completion of:

(A) initial training required by and conducted or authorized by DADS; and

(B) ongoing training if required by and conducted or authorized by DADS;

(3) meet criteria of:

(A) §41.225 of this chapter (relating to Criminal Conviction History Checks);

(B) §41.227 of this chapter (relating to Required Registry Checks);

(C) §41.231 of this chapter (relating to Verification of Eligibility of an Employee or Contractor) if contracted by the employer; and

(D) requirements of the individual's program when applicable; and

(4) be:

(A) retained by the employer; or

(B) an employee or contractor of:

(i) a CDSA; or

(ii) another entity.

(b) To provide support consultation as a support advisor, a person must demonstrate competency in the delivery of support consultation services as determined by DADS. To be a support advisor, the person must demonstrate competency to DADS in:

(1) principles of self-determination;

(2) the provisions of this chapter;

(3) the provisions and requirements of DADS home and community-based programs offering the CDS option, including:

(A) the scope and definition of services provided by each program;

(B) requirements for documentation of service delivery;

(C) allowable and non-allowable expenditures; and

(D) the application of CDS in each program;

(4) methods for accessing information and resources timely through government agencies, including DADS, related to the CDS option and employer responsibilities;

(5) documentation requirements to meet employer responsibilities; and

(6) roles and responsibilities of:

(A) the support advisor;

(B) the CDSA;

(C) the case manager or service coordinator;

(D) the individual receiving services;

(E) the employer;

(F) service providers;

(G) the DR; and

(H) traditional program providers and agencies.

(c) An employer or DR must not retain a support advisor applicant for service delivery before:

(1) receiving authorization for support consultation by the individual's service planning team;

(2) obtaining written approval from the CDSA of the budget for funds for the service; and

(3) obtaining written approval from the CDSA of the applicant's eligibility.

(d) An employer or DR must ensure that a support advisor meets the service provider requirements of this chapter, including:

(1) obtaining documentation required to verify the applicant's qualifications and eligibility to provide support consultation services; and

(A) submit documentation to the CDSA for review of the person's eligibility;

(B) obtaining approval from the CDSA of the person's eligibility to provide support consultation services; and

(C) maintaining documentation to verify continued eligibility during service delivery;

(2) entering into a service agreement with the contractor using the appropriate DADS form;

(3) assisting the CDSA in obtaining a completed service agreement between the support advisor and the CDSA before initial payment for delivery of services; and

(4) retaining documentation of services delivered by the contractor.

(e) Upon retaining a support advisor employed by or contracted with a CDSA or an entity, the employer must obtain from the CDSA or the entity documentation required to verify the individual's qualifications and ongoing eligibility to provide support consultation services.

§41.605. Support Advisor Responsibilities.

(a) A support advisor must provide practical skills training in accordance with the individual's service plan, including:

(1) principles of self-determination;

(2) compliance requirements of the individual's program as related to services delivered through the CDS option;

(3) completion of forms, assessments, and other documents required for the individual's program that require individual or LAR input or completion;

(4) recruiting, screening, and hiring workers, preparing job descriptions, verifying employment eligibility and qualifications, and training for employees;

(5) completion of documents required to employ an individual, retain a contractor or vendor, and manage service providers;

(6) recruitment and procurement of employees, contractors, and vendors;

(7) negotiations of service agreements, including pricing and scheduling of services, goods, and items;

(8) management of service providers for authorized program services delivered through the CDS option;

(9) effective communication, decision making, and problem-solving skills to meet employer responsibilities;

(10) development, revision, and implementation of service back-up plans;

(11) compliance with the individual's program and this chapter;

(12) tools for accessing information, resources, and assistance timely through government agencies, including DADS, as needed through means available to the individual, employer, or DR;

(13) contacting appropriate persons or entities based on their roles, responsibilities, and eligibility related to the individual's program or the CDS option, including:

(A) a case manager or service coordinator;

(B) potential and current service providers, including:

(i) an employee;

(ii) a contractor;

(iii) a vendor;

(iv) a CDSA; and

(v) a support advisor;

(C) traditional program provider agencies;

(D) government agencies, including DADS and the Department of Family and Protective (DFPS); and

(E) the employer, the individual, and the DR; and

(14) ongoing employer-related skills.

(b) A support advisor must provide assistance, as required in accordance with the individual's service plan, including:

(1) completing forms, assessments, and other documents required by the individual's program that require individual or LAR input or completion;

(2) recruiting, screening, and hiring workers, preparing job descriptions, verifying employment eligibility, qualifications, and training for employees;

(3) completing documents required to employ an individual, retain a contractor or vendor, or managing service providers;

(4) recruiting and retaining employees, contractors, and vendors;

(5) negotiating service agreements, including pricing and scheduling of services, goods, and items;

(6) managing service providers for authorized program services delivered through the CDS option;

(7) helping an individual to meet employer responsibilities by using effective communication, decision making, and problem-solving skills;

(8) developing, revising, and implementing service back-up plans;

(9) accessing information, resources, and assistance through government agencies, including DADS, as needed through means available to the individual, employer, or DR;

(10) contacting appropriate persons or entities based on their roles, responsibilities, and eligibility related to the individual's program or the CDS option, including:

(A) a case manager or service coordinator;

(B) potential and current service providers including:

(i) an employee;

(ii) a contractor;

(iii) a vendor;

(iv) a CDSA; or

(v) a support advisor;

(C) traditional program provider agencies;

(D) government agencies, including DADS and DFPS; and

(E) the employer, the individual, and the DR; and

(11) ongoing employer-related skills.

(c) A support advisor must document service delivery in accordance with the requirements of the individual's program.

(d) A support advisor must notify the individual's case manager or service coordinator:

(1) when service goals have been met;

(2) if the person receiving support consultation is unable or unwilling to cooperate with service delivery; or

(3) of the progress and status of the service required by the individual's program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2006.

TRD-200606576
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2007
Proposal publication date: September 15, 2006
For further information, please call: (512) 438-4162

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SUBCHAPTER G. REPORTING ALLEGATIONS

40 TAC §41.701

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services; and Texas Human Resources Code, §32.066 which requires HHSC to establish a consumer-directed services program in which individuals enrolled in Medicaid waiver programs direct the delivery of program services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2006.

TRD-200606577
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2007
Proposal publication date: September 15, 2006
For further information, please call: (512) 438-4162

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SUBCHAPTER H. OVERSIGHT

40 TAC §41.801

The new section is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; Texas Government Code, §531.051, which requires the Health and Human Services Commission to develop a program in which the use of vouchers is available as a payment option for the delivery of certain services to persons with disabilities, including Medicaid services; and Texas Human Resources Code, §32.066 which requires HHSC to establish a consumer-directed services program in which individuals enrolled in Medicaid waiver programs direct the delivery of program services.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on December 8, 2006.

TRD-200606578

Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Effective date: January 1, 2007
Proposal publication date: September 15, 2006
For further information, please call: (512) 438-4162

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Adopted Rule Reviews

Texas Animal Health Commission

Title 4, Part 2

The Texas Animal Health Commission (commission) has completed the review of Chapter 47, concerning "Approved Personnel," in accordance with Texas Government Code, §2001.039. The rules reviewed are found in Chapter 47, which is located in Title 4, Part 2 of the Texas Administrative Code, and contain the following sections: §47.1, Definitions; §47.2, General Requirements; §47.3, Requirements for Brucellosis Testing; §47.4, Brucellosis Calfhood Vaccination Requirements; §47.5, Suspension or Revocation of Approved Personnel Status; and §47.6, Restoration of Approved Personnel Status.

The rule review was published in the August 25, 2006, issue of the *Texas Register* (31 TexReg 6823).

No comments were received regarding adoption of the rule review.

Elsewhere in this issue of the *Texas Register*, the Texas Animal Health Commission adopts the amendments of §47.1 and §47.2.

The commission finds reason for the rule to continue to exist. This concludes the review of Chapter 47, Approved Personnel.

TRD-200606604
Gene Snelson
General Counsel
Texas Animal Health Commission
Filed: December 11, 2006

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The Texas Animal Health Commission (commission) has completed the review of Chapter 49, concerning "Equine," in accordance with the Texas Government Code, §2001.039. The rules reviewed are found in Chapter 49, which is located in Title 4, Part 2 of the Texas Administrative Code, and contain the following sections: §49.1, Equine Infectious Anemia (EIA): Identification and Handling of Infected Equine; §49.2, Interstate Movement Requirements; and §49.3, Requirements for Dealer Recordkeeping.

The rule review was published in the August 25, 2006, issue of the *Texas Register* (31 TexReg 6823).

Numerous comments were received regarding the rule review.

The Commission received a large number of comments regarding regulatory provisions contained in Chapter 49, as related to equine designated for slaughter §49.1(l) relates to having a negative test, within the previous twelve months, for Equine Infectious Anemia in order to transfer ownership of an equine. An exception allows shipment of untested equine go to slaughter where it is tested at Commission expense. The second provision of focus was §49.1(m) which requires that untested animals going to slaughter be identified and permitted to arrive at the slaughter facility within ten days of the issuance of the permit.

Comments:

Generally all the comment letters made similar arguments and recommendations for the Commission as addressed by those provided below.

The Commission received a letter from a commenter which made several points regarding the Commission's requirements on equine sold without a test and designated for slaughter. He stated that the "TAHC should not be condemning healthy usable animals to slaughter simply because results from an EIA test were not received prior to auction of the animal." He also stated that "(u)nknowing (ignorant of Commissions rules) owners of untested animals should not suffer economic losses because of unwarranted Commission actions."

He also stated that the Commission is charged with the health and welfare of livestock. As such, it is the Commission's duty to see that any stolen animal is returned to its rightful owners. The three to five day additional waiting period (for standard test results) in a public place would assist law enforcement officers and owners to locate and recover stolen horses. He further stated that the Commission should not force an unknowing (ignorant of Commissions rules) animal owner to commit a horse to slaughter when he might otherwise object for religious or other personal reasons. Under §49.1(g), the owner of a worst case reactor animal still has the option to let the positive-testing animal live out its life on owners property. He charges that the Commission is not consistent with its own policy. He requests that the Commission allow for an equine to be sold through a market and tested after the fact. He believes that these amendments would be consistent with law created by HB 1732 during the 76th Legislative Session. Completion of transfer could only occur after the results of the EIA test were returned. He goes on to state that these amendments would be consistent with USDA publication APHIS 91-55-064 (EIA Uniform Methods and Rules) which state: "If an EIA test is not possible prior to each sale, then the equines must be held in quarantine within the State until the test results are known."

Lastly, the commenter argues that "the Commerce Clause, U.S. Constitution, article I, 8, grants Congress the authority to regulate commerce with foreign nations, and among the several States. States may not adopt laws that directly affect interstate and foreign commerce." He made the argument that §49.1(m), as it is currently written, restricting sales of untested (for EIA) equines sold at livestock markets and auctions to killer buyers only, unfairly impedes with interstate and intrastate agricultural commerce. Out-of-state as well as out-of-country

livestock dealers and individuals who utilize equines for purposes other than for meat cannot bid on un-tested equine at public auction in Texas without committing a Class C misdemeanor.

The Texas Humane Legislation Network (THLN), a non-profit dedicated to the welfare of animals through legislation, education, and advocacy, submitted comments. They requested §49.1(m) be modified regarding the requirements that equine sold through a market without a test be permitted to slaughter by commission personnel. A number of comments provided the same recommended change to the rule. They provided language that requested the provision be modified as provided below: (m) Any equine sold, through a market, which has not had a negative EIA test in the twelve months preceding the date of sale [must be permitted for movement, by an accredited veterinarian or other authorized state or federal personnel, to slaughter. The permit shall be signed by the consignor and contain information regarding either permanent identification (i.e. branding, tagging or other means acceptable to the commission) of the equine or by the number on a red collar, issued by the commission, to be verified at the slaughter plant, slaughter-only market, or slaughter-only buying facility. These equine shall arrive at the slaughter facility no later than ten days from the date of the issuance of the permit.] must be held in quarantine (from other equines) at the livestock market at buyer expense till coggins test results are returned. If the test is negative, the healthy horse is released to the buyer. If the test is positive, then it would be up to the seller to pay for the test and quarantine. It would be the decision of the seller to release the animal to the buyer if the purchaser was a killer buyer (buyer would reimburse seller for testing and quarantine cost), re-auction the animal strictly for slaughter, take it home to live out it's life, or have it euthanized.

The Farm and Ranch Freedom Alliance (FARFA) submitted comments on the review of Chapter 49 and requested a repeal of 4 TAC §49.1(m). While Coggins testing is a useful tool for addressing Equine Infectious Anemia, the requirement that untested horses be slaughtered does not have a valid health reason. The rule does not require the slaughter of sick horses, but simply untested horses. The risk of a positive Coggins test does not justify this regulation. There is no reason to think that the slaughter of untested animals contributes in any way to the reduction of EIA in horses or serves the public interest.

The regulation allows the untested horses to be held for up to 10 days before slaughter. Rather than requiring that the horses be sold to a kill buyer, that same 10-day window could be used to test the horse and determine whether or not it has EIA. The rare horse that has EIA would quickly be detected through the testing and could be handled under the regulatory provisions for reactors. The vast majority of horses, who would test negative for EIA, could be sold to regular buyers and continue to have productive, useful lives.

But any regulation that requires the slaughter of an animal must be well-supported by both scientific evidence and a cost-benefit analysis. Not only does the current rule not serve a valid health purpose, but it costs the taxpayers dollars because the state pays for Coggins tests at the slaughterhouses. The regulation also reduces the choices for both sellers and buyers. This regulation does not reduce the spread of EIA and interferes with the free market. We, therefore, ask that you propose a repeal of §49.1(m).

We received a number of comments focused on concern that the regulation provides that horses sold at a market without current Coggins papers can only be sold for slaughter. This provision applies even if the horse is healthy and, if tested, would test negative. Healthy animals should not be killed simply because of a bureaucratic requirement. There is no reason to think that the slaughter of untested animals contributes in any way to the reduction of EIA in horses.

The regulation allows the untested horses to be held for up to 10 days before slaughter. That same 10-day window could be used to test the horse and determine whether or not it has EIA, instead of mandating its sale to a kill buyer. The rare horse that has EIA will quickly be detected through the testing, and can be handled under the regulatory provisions for reactors. The vast majority of horses, who would test negative for EIA, could be sold to regular buyers and continue to have productive, useful lives.

The state pays for Coggins tests at the slaughterhouses. What is the animal health reason for this use of our tax dollars? This is not about being for or against horse slaughter. Rather, it is an issue of whether animals should be condemned to slaughter simply because they have not been tested, only to then be tested at taxpayer expense at the slaughterhouse. This regulation does not reduce the spread of EIA, interferes with the free market, and uses taxpayer dollars to benefit the slaughter buyers. I therefore ask that you propose a repeal of §49.1(m). They sum up their reason's as follows: (1) TAHC should not be condemning healthy usable animals to slaughter simply because results from an EIA test was not received prior to auction of the animal. (2) owners of untested animals should not suffer economic losses because of unwarranted Commission actions. (3) according to USDA reports from FY 2004, only 333 horses tested positive for EIA nationwide. The rate of positive tests was .017%; therefore, it is highly unlikely any particular animal at public sale would test positive for EIA. (4) The commission is charged with the health and welfare of livestock, as such it is the Commission's duty to see that any stolen animal is returned to its rightful owners. The three to five days additional waiting period (for test results) in a public place would assist law enforcement officers and owners to locate and recover stolen horses. (5) The commission should not force an unknowing animal owner to commit a horse to slaughter when he might otherwise object for religious or other personal reasons. Under paragraph (G), the owner of a worse case reactor animal still has the option to let the positive testing animal live out its life on his property. The Commission is not consistent with it's own policy.

Another commenter sent in comments that stated that she thinks the regulations that have been in place for the past several years represent a good compromise and have served us very well. I support them in their current form with one exception. She went on to state that "(s)tolen horses are almost certainly going to arrive at an auction without EIA tests (unless the thief alters some test papers, which is possible). And, of course, some horses will arrive at the auction without having been tested for other reasons." She also stated that she had talked to several people who expressed frustration because they attended an auction, saw a horse that they wanted to bid on, but were told that the horse could only go to the killer buyer because it did not have a Coggins test. She concludes by stating that for these reasons, "I would like to see the regulations changed so that any willing buyer could, at his own expense, have the horse tested and held under quarantine at the sale barn until the results of the test come back. If the test comes back positive, it should be the seller's duty to pay for the test and other expenses incurred."

Agency Response:

Thank you for your comments regarding the EIA testing requirements contained in §49.1 of the Texas Administrative Code. The EIA requirements contained in §49.1 are the administrative rules developed to fulfill the statutory requirements provided by §161.149, Test for Equine Infectious Anemia, Texas Agriculture Code. The Administrative Code provides the mechanism for implementation of the requirements of the Agriculture Code. The statute provides that "...(b) A person commits an offense if the person transfers ownership of an equine animal eight months of age or older that has not been tested negative for equine infectious anemia during the 12 months preceding the date of the transfer unless the equine animal: (1) is a nursing foal that is transferred with

its dam and the dam has tested negative for equine infectious anemia during the 12 months preceding the date of the transfer; or, (2) is sold to slaughter to be tested for equine infectious anemia at a slaughter establishment...." Repealing §49.1 would not remove the requirements of law.

We agree that the number of EIA positive horses has declined significantly over the past few years. We believe the reason for the decline is the requirement to test horses that are sold or are housed, stabled or commingled with other horses and horses that are consigned to slaughter.

An owner of a horse has a choice prior to consignment of a horse to a sale. The owner can test the animal and if the test is negative for EIA, the animal can be sold to anyone who will buy it; or, the owner can refuse to test the horse, at which time the horse is restricted to sale into slaughter channels.

The law requires that horses sold to slaughter be tested. The only way available to the agency to fulfill this requirement is to cover the cost of the test with state funds. Section 161.049 of the Agriculture Code does not provide a mechanism for the agency to charge the cost of the test to any other entity. It simply says that slaughter horses be tested, therefore, the agency is required to pay the cost of the test. The testing of horses sold to slaughter provides the ability to identify infected animals and herds that may otherwise be missed.

Regarding §49.1(m) that equine sold through a market without a test and destined for slaughter are permitted using a VS 1-27 form and identified with a numbered red collar and issued by the commission. This information is verified upon arrival at the slaughter facility. The rule is intended to provide a specifically stated requirement which is applicable to a person who buys a horse for slaughter as well as a timeframe for arrival at slaughter to ensure greater accountability by the buyer or consignor. These equine shall arrive at the slaughter facility no later than ten days from the date of the issuance of the permit. Without this provision, some buyers would take a very long time to actually take the permitted animal to slaughter which makes verification more difficult on agency personnel.

The commission finds reason for the rule to continue to exist. This concludes the review of Chapter 49, Equine.

TRD-200606605
Gene Snelson
General Counsel
Texas Animal Health Commission
Filed: December 11, 2006

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The Texas Animal Health Commission (commission) has completed the review of Chapter 56, concerning "Grants, Gifts and Donations," in accordance with Texas Government Code, §2001.039. The rules are found in Chapter 56, which is located in Title 4, Part 2 of the Texas Administrative Code, and contain the following sections: §56.1, Purpose; §56.2, Definitions; §56.3, Acceptance of Grants, Gifts and Donations; §56.4, Solicitation; §56.5, Restricted/Unrestricted; §56.6, Standards of Conduct between Employers and Officers and Private Donors; and §56.7, Acceptance of Gift from Party to Contested Case Prohibited.

The rule review was published in the August 25, 2006, issue of the *Texas Register* (31 TexReg 6823).

No comments were received regarding adoption of the rule review.

The commission finds reason for the rule to continue to exist. This concludes the review of Chapter 56, Grants, Gifts and Donations.

TRD-200606607
Gene Snelson
General Counsel
Texas Animal Health Commission
Filed: December 11, 2006

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The Texas Animal Health Commission (commission) has completed the review of Chapter 53, concerning "Market Regulation," in accordance with Texas Government Code, §2001.039. The rules are found in Chapter 53, which is located in Title 4, Part 2 of the Texas Administrative Code, and contain the following sections: §53.1, Facilities; §53.2, Release of Animals; §53.3, Quarantine; §53.4, Market Identification; and §53.5, Market Recordkeeping.

The rule review was published in the August 25, 2006, issue of the *Texas Register* (31 TexReg 6824).

No comments were received regarding adoption of the rule review.

The commission finds reason for the rule to continue to exist. This concludes the review of Chapter 53, Market Regulation.

TRD-200606606
Gene Snelson
General Counsel
Texas Animal Health Commission
Filed: December 11, 2006

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Texas Education Agency

Title 19, Part 2

The Texas Education Agency (TEA) adopts the review of rules in the following subchapters of 19 TAC Chapter 61, School Districts, pursuant to the Texas Government Code, §2001.039: Subchapter AA, Commissioner's Rules on School Finance; Subchapter BB, Commissioner's Rules on Reporting Requirements; Subchapter CC, Commissioner's Rules Concerning School Facilities; Subchapter DD, Commissioner's Rules Concerning Missing Child Prevention and Identification Programs; Subchapter EE, Commissioner's Rules on Reporting Child Abuse and Neglect; Subchapter FF, Commissioner's Rules Concerning High School Diplomas for Certain Veterans; Subchapter GG, Commissioner's Rules Concerning Counseling Public School Students; and Subchapter HH, Commissioner's Rules Concerning Classroom Supply Reimbursement Program. The TEA proposed the review of 19 TAC Chapter 61, Subchapters AA - HH, in the July 28, 2006, issue of the *Texas Register* (31 TexReg 6059).

Relating to the review of 19 TAC Chapter 61, Subchapter AA, the TEA finds that the reasons for adopting Subchapter AA continue to exist and readopts the rules, with the exception of 19 TAC §61.1010, Standards for School District Administrative Cost Ratios, and 19 TAC §61.1013, Gap Funding. The authorizing statute for 19 TAC §61.1010 was repealed; therefore, the TEA will repeal this rule in the near future. The authorizing statute for 19 TAC §61.1013 has expired, and the TEA no longer distributes funding under this provision. The TEA will repeal this rule in the near future. The TEA will also propose amendments to rules in this subchapter to align provisions with current statute, including new requirements resulting from House Bill 1, 79th Texas Legislature, Third Called Session, 2006. The affected rules include: 19 TAC §61.1011, Public Education Grant Supplemental Payments; 19 TAC §61.1014, Determination of Foundation School Program Gains, and 19 TAC §61.1018, Payment of Supplemental Compensation.

Relating to the review of 19 TAC Chapter 61, Subchapter BB, the TEA finds that the reasons for adopting Subchapter BB continue to exist and

readopts the rules. The TEA is proposing no changes to Subchapter BB at this time.

Relating to the review of 19 TAC Chapter 61, Subchapter CC, the TEA finds that the reasons for adopting Subchapter CC continue to exist and readopts the rules. The TEA will propose an amendment to 19 TAC §61.1036, School Facilities Standards for Construction, on or after January 1, 2004, to update references to statute and state agency names.

Relating to the review of 19 TAC Chapter 61, Subchapter DD, the TEA finds that the reasons for adopting Subchapter DD continue to exist and readopts the rule. The TEA is proposing no changes to Subchapter DD at this time.

Relating to the review of 19 TAC Chapter 61, Subchapter EE, the TEA finds that the reasons for adopting Subchapter EE continue to exist and readopts the rule. The TEA will propose an amendment to 19 TAC §61.1051, Reporting Child Abuse and Neglect, to update reference to the Department of Family and Protective Services and related information.

Relating to the review of 19 TAC Chapter 61, Subchapter FF, the TEA finds that the reasons for adopting Subchapter FF continue to exist and readopts the rule. The TEA is proposing no changes to Subchapter FF at this time.

Relating to the review of 19 TAC Chapter 61, Subchapter GG, the TEA finds that the reasons for adopting Subchapter GG continue to exist and readopts the rule. The TEA will propose an amendment to 19 TAC §61.1071, Counseling Public School Students Regarding Higher Education, to implement changes resulting from House Bill 1, 79th Texas Legislature, Third Called Session, 2006.

Relating to the review of 19 TAC Chapter 61, Subchapter HH, the TEA finds that the reasons for adopting Subchapter HH continue to exist and readopts the rule. Effective August 13, 2006, §61.1081, Teacher Supply Reimbursement Grant Program, was amended to update several provisions of the program and to update the authorizing statute reference from the TEC, §21.413, to the TEC, §21.414. The TEA is proposing no additional changes to Subchapter HH at this time.

The TEA received no comments related to the rule review of 19 TAC Chapter 61, Subchapters AA - HH.

This concludes the review of 19 TAC Chapter 61.

TRD-200606580
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: December 8, 2006

♦ ♦ ♦

Texas Veterans Commission

Title 40, Part 15

The Texas Veterans Commission (commission) has completed the review of Texas Administrative Code, Title 40, Part 15, Chapter 450, concerning "Veterans County Service Officers Certificate of Training." Chapter 450 consists of §450.1, "Definitions;" §450.3, "General Provisions;" and §450.5, "Documentation of Attendance."

Notice of the review of Chapter 450 was published in the September 22, 2006, issue of the *Texas Register* (31 TexReg 8113). No comments were received in response to the notice.

The commission finds that the reasons for initially adopting Chapter 450 continue to exist and readopts these sections without changes in accordance with the requirements of Government Code §2001.039.

TRD-200606615
Tina Coronado
General Counsel
Texas Veterans Commission
Filed: December 11, 2006

♦ ♦ ♦

The Texas Veterans Commission (commission) has completed the review of Texas Administrative Code, Title 40, Part 15, Chapter 451, concerning "Veterans County Service Officers Accreditation." Chapter 451 consists of §451.1, "Definitions" and §451.3, "General Provisions."

Notice of the review of Chapter 451 was published in the September 22, 2006, issue of the *Texas Register* (31 TexReg 8113). No comments were received in response to the notice.

The commission finds that the reasons for initially adopting Chapter 451 continue to exist and readopts these sections without changes in accordance with the requirements of Government Code §2001.039.

TRD-200606612
Tina Coronado
General Counsel
Texas Veterans Commission
Filed: December 11, 2006

♦ ♦ ♦

The Texas Veterans Commission (commission) has completed the review of Texas Administrative Code, Title 40, Part 15, Chapter 452, concerning "Administration General Provisions." Chapter 452 consists of §452.1, "Charges for Copies of Public Records."

Notice of the review of Chapter 452 was published in the September 22, 2006, issue of the *Texas Register* (31 TexReg 8113). No comments were received in response to the notice.

The commission finds that the reasons for initially adopting Chapter 452 continue to exist and readopts the section without changes in accordance with the requirements of Government Code §2001.039.

TRD-200606613
Tina Coronado
General Counsel
Texas Veterans Commission
Filed: December 11, 2006

♦ ♦ ♦

The Texas Veterans Commission (commission) has completed the review of Texas Administrative Code, Title 40, Part 15, Chapter 453, concerning "Historically Underutilized Business Program." Chapter 453 consists of §453.1, "Historically Underutilized Business Program."

Notice of the review of Chapter 453 was published in the September 22, 2006, issue of the *Texas Register* (31 TexReg 8114). No comments were received in response to the notice.

The commission finds that the reasons for initially adopting Chapter 453 continue to exist and readopts the section without changes in accordance with the requirements of Government Code §2001.039.

TRD-200606614
Tina Coronado
General Counsel
Texas Veterans Commission
Filed: December 11, 2006

TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 16 TAC §18.12(a)

Table 1. Suggested Penalties for Violations of Chapter 18 and Penalty Calculation Worksheet.

Line no.	Conduct	Cite	Suggested Penalty	Amount
1	Failure to comply with Chapter 18	§18.1	$1,000	$
2	False report of emergency line locate request	§18.1	$1,000	$
3	Failure to notify notification center	§18.3	$1,000	$
4	Failure to include method for positive response	§18.3	$1,000	$
5	Failure to use white lining where appropriate	§18.3	$1,000	$
6	Failure to conduct a required face-to-face meeting	§18.3	$1,000	$
7	Failure to establish protocols when required	§18.3	$1,000	$
8	Failure to give second notice when required	§18.4	$1,000	$
9	Failure to protect locate markings	§18.4	$ 500	$
10	Failure to wait the required time to dig	§18.4	$1,000	$
11	Failure to provide positive response	§18.5	$2,500	$
12	Failure to keep record of positive response	§18.5	$1,000	$
13	Failure to notify of no positive response	§18.5; §18.11	$1,000	$
14	Failure to mark excavation or pipeline properly	§§18.6 - 18.8	$1,000	$
15	Failure to dig with care within Tolerance Zone	§18.10	$1,000	$
16	Failure to report damage by third party	§18.11	$1,000	$
17	Subtotal of penalty amounts (lines 1 through 16)			**$**
18	Reduction for settlement before hearing: up to 50% of line 17 amt.		%	$
19	**Subtotal (amount on line 17 less applicable settlement reduction on line 18)**			**$**
	Penalty enhancements	**Recommended Enhancement**		
20	Impact to a residential or public area	$5,000-$25,000		$
21	Reckless conduct of person charged	Double penalty amount		$
22	Second Offense	Double penalty amount		$
23	More than 2 but fewer than 5 violations	Triple Penalty amount		$
24	More than 5 but fewer than 10 violations	Four times Penalty amount		
25	More than 10 violations	Five times Penalty amount		$
26	**Subtotal (amount on line 19 plus all amounts on lines 20 through 25)**			**$**
27	Reduction for demonstrated good faith of person charged			$
28	**TOTAL PENALTY (amount on line 26 less any amount shown on line 27)**			**$**

Figure: 25 TAC §157.125(x)

ADVANCED (LEVEL III) TRAUMA FACILITY CRITERIA

Advanced Trauma Facility (Level III) - provides resuscitation, stabilization, and assessment of injury victims and either provides treatment or arranges for appropriate transfer to a higher level designated trauma facility; provides ongoing educational opportunities in trauma related topics for health care professionals and the public; and implements targeted injury prevention programs (see attached standards). The administrative commitment of a Level III trauma facility includes developing processes that define the trauma patient population evaluated by the facility and track them throughout the course of their stay in order to maximize funding opportunities.

A.	**TRAUMA PROGRAM**	
1.	Trauma Service.	E
2.	An identified Trauma Medical Director (TMD) who: ▪ is a general surgeon. ▪ is currently credentialed in Advanced Trauma Life Support (ATLS) or an equivalent course approved by the Department of State Health Services (DSHS). ▪ is charged with overall management of trauma services provided by the hospital. ▪ shall have the authority and responsibility for the clinical oversight of the trauma program. This is accomplished through mechanisms that may include: recommending trauma team privileges; developing treatment protocols; cooperating with the nursing administration to support the nursing needs of the trauma patients; coordinating the performance improvement (PI) peer review; correcting deficiencies in trauma care or excluding from trauma call those trauma team members who do not meet criteria; coordinating the budgetary process for the trauma program; and should include such things as periodic rounds on all admitted major or severe trauma patients, chairing the trauma PI process and oversight of multidisciplinary trauma conferences. a. The TMD shall be credentialed by the hospital to participate in the resuscitation and treatment of trauma patients using criteria to include such things as board-certification/board-eligibility, trauma continuing medical education, compliance with trauma protocols, and participation in the trauma PI program. b. There shall be a defined job description and organizational chart delineating the TMD's role and responsibilities. c. The TMD shall participate in a leadership role in the hospital, community, and emergency management (disaster) response committee. d. The TMD should participate in the development of the regional trauma system plan.	E
3.	An identified Trauma Nurse Coordinator/Trauma Program Manager (TNC/TPM) who: ▪ is a registered nurse. ▪ has successfully completed and is current in the Trauma Nurse Core Course (TNCC) or Advanced Trauma Course for Nurses (ATCN) or a DSHS-approved equivalent. ▪ has successfully completed and is current in a nationally recognized pediatric advanced life support course ((e.g. Pediatric Advanced Life Support (PALS) or the Emergency Nurse Pediatric Course (ENPC)). ▪ shall have the authority and responsibility to monitor trauma patient care from ED admission through operative intervention(s), ICU care, stabilization, rehabilitation care, and discharge, including the trauma PI program.	E

	a. There shall be a defined job description and organizational chart delineating the TNC/TPM's role and responsibilities. b. The TNC/TPM shall participate in a leadership role in the hospital, community, and regional emergency management (disaster) response committee. c. This position shall be full-time with a minimum of 80% of the time dedicated to the Trauma program. d. The TNC/TPM should complete a course designed for his/her role which provides essential information on the structure, process, organization and administrative responsibilities of a PI program to include a trauma outcomes and performance improvement course ((e.g. Trauma Outcomes Performance Improvement Course (TOPIC) or Trauma Coordinators Core Course (TCCC)).	
4.	There shall be an identified Trauma Registrar, who is separate from but supervised by the TNC/TPM, who has appropriate training ((e.g. the Association for the Advancement of Automotive Medicine (AAAM) course, American Trauma Society (ATS) Trauma Registrar Course)) in injury severity scaling. Typically, one full-time equivalent (FTE) employee dedicated to the registry shall be required to process approximately 500 patients annually.	E
5.	Written protocols, developed with approval of the hospital's medical staff, for: a. Trauma team activation. b. Identification of trauma team responsibilities during a resuscitation. c. Resuscitation and treatment of trauma patients. d. Triage, admission and transfer of trauma patients.	E
6.	All major and severe trauma patients shall be admitted to an appropriate surgeon and all multi-system trauma patients shall be admitted to a general surgeon.	E

B.	**PHYSICIAN SERVICES**	
1.	**SURGERY DEPARTMENTS/DIVISIONS/SERVICES/SECTIONS**	
	a. **General Surgery**	E
	A general surgeon who is providing trauma coverage shall be currently credentialed in ATLS or an equivalent course approved by DSHS. A general surgeon who is providing trauma coverage shall be credentialed by the TMD to participate in the resuscitation and treatment of trauma patients to include requirements such as current board certification/eligibility, an average of 9 hours of trauma-related continuing medical education per year, compliance with trauma protocols, and participation in the trauma PI program. Additionally, the core attending general surgeons that are providing coverage shall attend 50% or greater of multidisciplinary and peer review trauma committee meetings. A non-board certified general surgeon desiring inclusion in a hospital's trauma program shall meet the American College of Surgeons (ACS) guidelines as specified in its most current version of the "Resources For Optimal Care Of the Injured Patient", Alternate Criteria section. Communication shall be such that the attending general surgeon shall be present in the ED at the time of arrival of the major or severe trauma patient; maximum response time of the attending surgeon shall be 30 minutes from trauma team activation. This system shall be continuously monitored by the trauma PI program.	E

	In hospitals with surgical residency programs, evaluation and treatment may be started by a team of surgeons that shall include a PGY4 or more senior surgical resident who is a member of that hospital's residency program. The attending surgeon's participation in major therapeutic decisions, presence in the emergency department for major resuscitations, and presence at operative procedures are mandatory. Compliance with these criteria and their appropriateness shall be monitored by the trauma PI program. When the attending surgeon is not activated initially and it has been determined by the emergency physician that an urgent surgical consult is necessary, maximum response time of the attending surgeon shall be 60 minutes from notification to physical presence at the patient's bedside. This system shall be continuously monitored by the trauma PI program. There shall be a published on-call schedule for obtaining general surgery care. There shall be a documented system for obtaining general surgical care for situations when the attending general surgeon on-call is unavailable. Ideally, the surgeon is on-call only at one institution; otherwise, a published back-up call schedule shall be in place in the emergency department. This system shall be continuously monitored by the trauma PI program.	
b.	**Orthopaedic Surgery**	E
	An orthopaedic surgeon who is providing trauma coverage shall be credentialed by the TMD to participate in the resuscitation and treatment of trauma patients to include requirements such as current board certification/eligibility, compliance with trauma protocols, and participation in the trauma PI program. Additionally, the orthopaedic surgeon representative to the multidisciplinary trauma committee shall have an average of 9 hours of orthopaedic-related continuing medical education per year and attend 50% or greater of multidisciplinary and peer review trauma committee meetings. A non-board certified orthopaedic surgeon desiring inclusion in a hospital's trauma program shall meet ACS guidelines as specified in its current addition of "Resources For Optimal Care Of the Injured Patient", Alternate Criteria section. An orthopaedic surgeon providing trauma coverage shall be promptly available (physically present) at the major or severe trauma patient's bedside within 30 minutes of request by the attending trauma surgeon or emergency physician from inside or outside hospital. This system shall be continuously monitored by the trauma PI program. When the orthopaedic surgeon is not activated initially and it has been determined by the emergency physician or trauma surgeon that an urgent surgical consult is necessary, maximum response time of the orthopaedic surgeon shall be 60 minutes from notification to physical presence at the patient's bedside. This system shall be continuously monitored by the trauma PI program. There shall be a published on-call schedule for obtaining orthopaedic surgery care. There shall be a documented system for obtaining orthopaedic surgery care for situations when the attending orthopaedic surgeon on call is unavailable. Ideally, the orthopaedic surgeon is on-call only at one institution; otherwise, a published back-up plan shall be in place in the emergency department. This system shall be continuously monitored by the trauma PI program.	E
c.	**Neurosurgery** *Neurosurgery coverage is desired in a level III, but the performance standards below are "essential" when a Level III has either full-time, routine or limited neurosurgical coverage.	D*

	A neurosurgeon who is providing trauma coverage shall be credentialed by the TMD to participate in the resuscitation and treatment of trauma patients to include requirements such as current board certification/eligibility, compliance with trauma protocols, and participation in the trauma PI program. Additionally, the neurosurgeon representative to the multidisciplinary trauma committee shall have an average of 9 hours of trauma-related continuing medical education per year and attend 50% or greater of multidisciplinary and peer review trauma committee meetings. A non-board–certified neurosurgeon desiring inclusion in a hospital's trauma program shall meet ACS guidelines as specified in its current addition of "Resources For Optimal Care Of the Injured Patient", Alternate Criteria section. A neurosurgeon providing trauma coverage shall be promptly available (physically present) at the major or severe trauma patient's bedside within 30 minutes of an emergency request by the attending trauma surgeon or emergency physician from inside or outside the hospital. This system shall be continuously monitored by the trauma PI program. When the neurosurgeon is not activated initially or was not consulted as an emergency and it has been determined by the emergency physician or trauma surgeon that an urgent neurosurgical consult is necessary, maximum response time of the neurosurgeon surgeon shall be 60 minutes from notification to physical presence at the patient's bedside. This system shall be continuously monitored by the trauma PI program. There shall be a published on-call schedule for obtaining neurosurgical care. There shall be a documented system for obtaining neurosurgical care for situations when neurosurgeon on-call is not available. Ideally, the neurosurgeon is on-call only at one institution; otherwise, a published back-up plan shall be in place in the emergency department. This system shall be continuously monitored by the trauma PI program.	E
	d. **Ophthalmic Surgery**	D
	e. **Otorhinolaryngologic Surgery**	D
	f. **Thoracic Surgery**	D
	g. **Urologic Surgery**	D
2.	**NON-SURGICAL SPECIALTIES AVAILABILITY**	
	a. **Emergency Medicine** - this requirement may be fulfilled by a physician credentialed by the hospital to provide emergency medical services. In-house 24 hours a day. Any emergency physician who is providing trauma coverage shall be credentialed by the TMD to participate in the resuscitation and treatment of trauma patients of all ages to include requirements such as current board certification/eligibility, compliance with trauma protocols, and participation in the trauma PI program. Additionally, the Emergency Medicine representative to the multidisciplinary trauma committee shall have an average of 9 hours of trauma-related continuing medical education per year and attend 50% or greater of multidisciplinary and peer review trauma committee meetings. An Emergency Medicine board-certified physician who is providing trauma coverage shall have successfully completed an ATLS Student Course or a DSHS-approved ATLS equivalent course. Current ATLS verification is required for all physicians who work in the emergency department and are not board certified in Emergency Medicine.	E
	b. **Radiology** - On-call and promptly available within 30 minutes of request from inside or outside the hospital. This system shall be continuously monitored by the trauma PI program.	E

	c. **Anesthesiology** - On-call and promptly available within 30 minutes of request from inside or outside the hospital. This system shall be continuously monitored by the trauma PI program. Requirements may be fulfilled by a member of the anesthesia care team credentialed by the TMD to participate in the resuscitation and treatment of trauma patients that may include requirements such as board certification, trauma continuing education, compliance with trauma protocols, and participation in the trauma PI program. The anesthesiology physician representative to the multidisciplinary trauma committee that provides trauma coverage to the facility shall attend 50% or greater of multidisciplinary and peer review trauma committee meetings.	E
	d. **Cardiology**	D
	e. **Hematology**	D
	f. **Nephrology**	D
	g. **Pathology**	D
	h. **Family Medicine** - The patient's primary care physician should be notified at an appropriate time.	D
	i. **Internal Medicine** - The patient's primary care physician should be notified at an appropriate time.	D
	j. **Pediatrics** - The patient's primary care physician should be notified at an appropriate time.	D

C.	**NURSING SERVICES (for all Critical Care and Patient Care Areas)**	
1.	All nurses caring for trauma patients throughout the continuum of care have ongoing documented knowledge and skill in trauma nursing for patients of all ages to include trauma specific orientation, annual clinical competencies, and continuing education.	E
2.	Written standards on nursing care for trauma patients for all units (i.e. ED, ICU, OR, PACU, general wards) in the trauma facility shall be implemented.	E
3.	A validated acuity-based patient classification system is utilized to define workload and number of nursing staff to provide safe patient care for all trauma patients throughout their hospitalization.	E
4.	A written plan, developed by the hospital, for acquisition of additional staff on a 24 hour basis to support units with increased patient acuity, multiple emergency procedures and admissions (i.e. written disaster plan.)	E
5.	50% of nurses caring for trauma patients certified in their area of specialty (e.g. CEN, CCRN, CNOR.)	D

D.	**PATIENT CARE AREAS/UNITS**	
1.	**EMERGENCY DEPARTMENT**	
	a. Designated physician director.	E
	b. Physician with special competence in the care of critically injured patients, who is designated member of the trauma team and physically present in the emergency department (ED) 24 hours per day.* *Neither a hospital's telemedical capabilities nor the physical presence of physician assistants (PAs) or clinical nurse specialists/nurse practitioners (CNSs/NPs) shall satisfy this requirement. Additionally, PAs/NPs and telemedicine-support physicians who participate in the care of major/severe trauma patients shall be credentialed by the hospital to participate in the resuscitation and treatment of said trauma patients, to include requirements such as board certification/eligibility, an average of 9 hours of trauma-related continuing medical education per year, compliance with trauma protocols, and participation in the trauma performance improvement program.	E

c.	The ED physician shall be activated on EMS communication with the ED or after a primary assessment of patients who arrive to the ED by private vehicle for the severe or major trauma patient. Response time shall not exceed thirty minutes from notification (this criterion shall be monitored in the trauma PI program.)	E
d.	A minimum of two registered nurses who have trauma nursing training shall participate in initial major trauma resuscitation.	E
e.	Nurse staffing in the initial resuscitation area is based on patient acuity and trauma team composition is based on historical census and acuity data.	E
f.	At least one member of the registered nursing staff responding to the trauma team activation for a major or severe trauma resuscitation has successfully completed and holds current credentials in an advanced cardiac life support course* (e.g. ACLS or hospital equivalent), a nationally recognized pediatric advanced life support course (e.g. PALS or ENPC) and TNCC or ATCN or a DSHS-approved equivalent. *A free-standing children's facility is exempt from the ACLS requirement.	E
g.	Nursing documentation for trauma patients is systematic and meets the trauma registry guidelines.	E
h.	100% of nursing staff have successfully completed and hold current credentials in an advanced cardiac life support course (e.g. ACLS or hospital equivalent), a nationally recognized pediatric advanced life support course (e.g. PALS or ENPC) and TNCC or ATCN or a DSHS-approved equivalent, within 18 months of date of employment in the ED or date of designation.** **Requirements for a free-standing children's facility: 100% of nursing staff who care for trauma patients have successfully completed and hold current credentials in ENPC or in a nationally recognized pediatric advanced life support course and TNCC or ATCN or a DSHS-approved equivalent, within 18 months of date of employment in the ED or date of designation.	E
i.	Two-way communication with all pre-hospital emergency medical services vehicles.	E
j.	Equipment and services for the evaluation and resuscitation of, and to provide life support for, critically or seriously injured patients of all ages shall include but not be limited to:	E
	1) Airway control and ventilation equipment including laryngoscope and endotracheal tubes of all sizes, bag-valve-mask devices (BVMs), pocket masks, oxygen	E
	2) Mechanical ventilator	E
	3) Pulse oximetry	E
	4) Suction devices	E
	5) Electrocardiograph-oscilloscope-defibrillator	E
	6) Internal age-specific paddles	E
	7) Supraglottic airway management device (e.g. LMA)	D
	8) Central venous pressure monitoring equipment	E
	9) All standard intravenous fluids and administration devices, including large-bore intravenous catheters and a rapid infuser system	E
	10) Sterile surgical sets for procedures standard for emergency room such as thoracostomy, venous cutdown, central line insertion, thoracotomy, diagnostic peritoneal lavage, airway control/cricothyrotomy, etc.	E
	11) Drugs and supplies necessary for emergency care	E
	12) Cervical spine stabilization device	E

	13) Length-based body weight & tracheal tube size evaluation system (such as Broselow tape) and resuscitation medications and equipment that are dose-appropriate for all ages	E
	14) Long bone stabilization device	E
	15) Pelvic stabilization device	E
	16) Thermal control equipment for patients and a rapid warming device for blood and fluids	E
	17) Non-invasive continuous blood pressure monitoring devices	E
	18) Qualitative end tidal CO_2 monitor	E
k.	X-ray capability.	E
	1) In-house technician 24-hours a day or on-call and promptly available within 30 minutes of request. This system shall be continuously monitored by the trauma PI program.	E
l.	Psychosocial Support Services - These services shall be promptly available within 30 minutes of request.	D
2.	**OPERATING SUITE**	
a.	Operating room services - shall be available 24 hours a day. With advanced notice, the Operating Room should be opened and ready to accept a patient within 30 minutes. This system shall be continuously monitored by the trauma PI program.	E
b.	Equipment - special requirements shall include but not be limited to:	E
	1) Thermal control equipment for patient and for blood and fluids	E
	2) X-ray capability including c-arm image intensifier with technologist available 24 hours a day	E
	3) Endoscopes, all varieties, and bronchoscope	E
	4) Equipment for long bone and pelvic fixation	E
	5) Rapid infuser system	E
	6) Appropriate monitoring and resuscitation equipment	E
	7) The capability to measure pulmonary capillary wedge pressure	E
	8) The capability to measure invasive systemic arterial pressure	E
3.	**POST-ANESTHESIA CARE UNIT** (surgical intensive care unit is acceptable)	
a.	Registered nurses and other essential personnel 24 hours a day.	E
b.	Appropriate monitoring and resuscitation equipment.	E
c.	Pulse oximetry.	E
d.	Thermal control equipment for patients and a rapid warming device for blood and fluids.	E
4.	**INTENSIVE CARE CAPABILITY**	
a.	Designated surgical director or surgical co-director who is responsible for setting policies and administration related to trauma ICU patients. A physician who is providing this coverage must be a surgeon who is credentialed by the TMD to participate in the resuscitation and treatment of trauma patients to include requirements such as board certification/board-eligibility, trauma continuing medical education, compliance with trauma protocols, and participation in the trauma PI program.	E E
b.	Physician, credentialed in critical care by the trauma director, on duty in ICU 24 hours a day or immediately available from in-hospital. Arrangements for 24-hour surgical coverage of all trauma patients shall be provided for emergencies and routine care. This system shall be continuously monitored by the trauma PI program.	E

	c. Registered Nurse-patient minimum ratio of 1:2 on each shift for patients identified as critical acuity.	E
	d. Appropriate monitoring and resuscitation equipment.	E
	e. Pulse oximetry.	E
	f. Thermal control equipment for patients and a rapid warming device for blood and fluids.	E
	g. The capability to measure pulmonary capillary wedge pressure.	E
	h. The capability to measure invasive systemic arterial pressure.	E

E.	**CLINICAL SUPPORT SERVICES**	
1.	**RESPIRATORY SERVICES**	
	In-house and available 24 hours per day.	E
2.	**CLINICAL LABORATORY SERVICE**	
	a. Services available 24 hours per day.	E
	b. Standard analyses of blood, urine, and other body fluids, including microsampling.	E
	c. Blood typing and cross-matching, to include massive transfusion and emergency release of blood policies.	E
	d. Comprehensive blood bank or access to a community central blood bank and adequate hospital storage facilities.	E
	e. Coagulation studies.	E
	f. Blood gases and pH determinations.	E
	g. Microbiology.	E
	h. Drug and alcohol screening: results should be included in all trauma PI reviews.	E
	i. Infectious disease Standard Operating Procedures.	E
	j. Serum and urine osmolality.	D
3.	**SPECIAL RADIOLOGICAL CAPABILITIES**	
	a. Sonography.	E
	b. Computerized tomography.	E
	In-house CT technician 24-hours per day or on-call and promptly available within 30 minutes of request. This system shall be continuously monitored by the trauma PI program.	E
	c. Angiography of all types.	D
	d. Nuclear scanning.	D

F.	**SPECIALIZED CAPABILITIES/SERVICES/UNITS**	
1.	**ACUTE HEMODIALYSIS CAPABILITY**	
	Transfer agreement if no capability.	E
2.	**ORGANIZED BURN CARE**	
	Established criteria for care of major or severe burn patients and/or a process to expedite the transfer of burn patients to a burn center or higher level of care to include such things as written protocols, written transfer agreements, and a regional trauma system transfer plan for patients needing a higher level of care or specialty services.	E
3.	**SPINAL CORD/HEAD INJURY REHABILITATION MANAGEMENT CAPABILITY**	
	a. In circumstances where a designated spinal cord injury rehabilitation center exists in the region, early transfer should be considered; transfer agreements should be in effect.	E

	b. In circumstances where a moderate to severe head injury center exists in the region, transfer should be considered in selected patients; and transfer agreements should be in effect.	E
4.	**REHABILITATION MEDICINE**	
	a. Physician-directed rehabilitation service, staffed by personnel trained in rehabilitation care and equipped properly for care of the critically injured patient, or transfer agreement when medically feasible to a rehabilitation facility and a process to expedite the transfer of rehabilitation patients to include such things as written protocols, written transfer agreements, and a regional trauma system transfer plan for patients needing a higher level of care or specialty services.	E
	b. Physical therapy.	E
	c. Occupational therapy.	E
	d. Speech therapy.	E
	e. Social Services.	E
G.	**PERFORMANCE IMPROVEMENT**	
1.	Track Record: On Initial Designation: a facility must have completed at least six months of audits on all qualifying trauma records with evidence of "loop closure" on identified issues. Compliance with internal trauma policies must be evident. On Re-designation: a facility must show continuous PI activities throughout its designation and a rolling current three year period must be available for review at all times.	E
2.	Minimum inclusion criteria: All trauma team activations (including those discharged from the ED), all trauma deaths or dead on arrivals (DOAs), all major and severe trauma admissions for greater than 23 hours; transfers-in and transfers-out; and readmissions within 48 hours after discharge.	E
3.	An organized trauma PI program established by the hospital, to include a pediatric-specific component and trauma audit filters (see "Advanced Trauma Facility Audit Filters" list.)	E
	a. Audit of trauma charts for appropriateness and quality of care.	E
	b. Documented evidence of identification of all deviations from trauma standards of care, with in-depth critical review.	E
	c. Documentation of actions taken to address all identified issues.	E
	d. Documented evidence of participation by the TMD.	E
	e. Morbidity and mortality review including decisions by the TMD as to whether or not standard of care was met.	E
	f. Documented resolutions "loop closure" of all identified issues to prevent future recurrences.	E
	g. Special audit for all trauma deaths and other specified cases, including complications, utilizing age-specific criteria.	E
	h. Multidisciplinary hospital trauma PI committee structure in place.	E
4.	Multidisciplinary trauma conference for PI activities, continuing education and problem solving to include documented nurse and pre-hospital participation.	E

5.	Regular and periodic multidisciplinary trauma conferences that include all members of the trauma team should be held. This conference shall be for the purpose of PI through critiques of individual cases.	E
6.	Feedback regarding trauma patient transfers-in from EDs and in-patient units shall be provided to all transferring facilities.	E
7.	Trauma registry - data shall be forwarded to the state trauma registry on at least a quarterly basis.	E
8.	Documentation of severity of injury (by Glasgow Comma Scale, revised trauma score, age, injury severity score) and outcome (survival, length of stay, ICU length of stay) with monthly review of statistics.	E
9.	Participation with the regional advisory council's PI program, including adherence to regional protocols, review of pre-hospital trauma care, submitting data to the RAC as requested including such things as summaries of transfer denials and transfers to hospitals outside of the RAC.	E
10.	Times of and reasons for diversion must be documented and reviewed by the trauma PI program.	E
11.	Published on-call schedule must be maintained for general surgeons and neurosurgeons, orthopaedic surgeons, anesthesia, radiology, and other major specialists if available.	E
12.	Performance improvement personnel - dedicated to and specific for the trauma program.	E
H.	**REGIONAL TRAUMA SYSTEM**	
	Must participate in the regional trauma system per RAC requirements.	E

I.	**TRANSFERS**	
1.	A process to expedite the transfer of applicable major and severe trauma patients to include such things as written protocols, written transfer agreements, and a regional trauma system transfer plan for patients needing higher level of care or specialty services.	E
2.	A system for establishing an appropriate landing zone in close proximity to the hospital (if rotor wing services are available.)	E

J.	**OUTREACH PROGRAM**	
1.	Provide education to and consultations with physicians of the community and outlying areas.	E
2.	A defined individual to coordinate the facility's community outreach programs for the public and professionals is evident.	E

K.	**PUBLIC EDUCATION/INJURY PREVENTION**	
1.	A public education program to address the major injury problems within the hospital's service area. Documented participation in a RAC injury prevention program is acceptable.	E
2.	Coordination and/or participation in community/RAC injury prevention activities.	E

L.	**TRAINING PROGRAMS**	
1.	Formal programs in trauma continuing education provided by hospital for staff based on needs identified from the performance improvement program for:	E
	a. Staff physicians	E
	b. Nurses	E

c. Allied health personnel, including mid-level providers such as physician assistants and nurse practitioners	E
d. Community physicians	E
e. Pre-hospital personnel	E

M. RESEARCH	
Trauma registry performance improvement activities.	E

Figure: 25 TAC §157.125(x)(1)

Advanced (Level III) Trauma Facility
Standards

1. A Level III Trauma Facility shall be an active participant on the regional advisory council (RAC) of its trauma service area (TSA).

2. A Level III Trauma Facility is available to care for all major and severe trauma patients 24 hours per day/ 7 days per week. Diversion of such patients to other facilities should be made rarely and only when resources are not available in the emergency department (ED) to stabilize and transfer these patients.

3. A Level III trauma facility with specialized trauma capabilities may not refuse a request for a trauma transfer from another hospital if it has the capacity to accept. Specialized trauma capability is any capability necessary for screening or stabilizing patients with emergency medical conditions that the transferring hospital may lack. The only two reasons a Level III trauma facility may refuse a trauma transfer request are lack of capability to handle the patient's emergency condition or when it is at capacity.

4. A log of all trauma transfer-in denials shall be maintained, reviewed through the facility's trauma performance improvement (PI) process, and referred to the appropriate RAC's systems PI process.

5. A Level III trauma facility shall have an established relationship with tertiary trauma facility (ies) to which it transfers patients and with all designated Level IV trauma facilities that regularly initiate transfers-in, to include such things as:

   - written transfer agreements
   - prospective dialogue regarding appropriate pre-transfer diagnostic laboratory and radiological studies so that each is cognizant of the other's performance expectations
   - consideration of a single phone call transfer-request process
   - provision of feedback regarding transfers as part of the PI program

6. A Level III trauma facility shall have age-specific policies\processes that demonstrate knowledge of the special resources potentially needed by injured patients of all ages, and is cognizant of the pediatric capabilities of the hospitals to which it customarily effectuates transfers so that it can determine the most appropriate facility.

7. A Level III trauma facility shall have an established relationship with the EMS providers, who transport to the facility, to facilitate adequate pre-arrival notification, appropriate documentation, and appropriate pre-hospital care.

8. A Level III trauma facility shall present its pediatric capabilities to the RAC so that both EMS providers and other hospitals can determine the most appropriate facility to transport or transfer critically injured pediatric patients.

9. The patient shall be treated per established trauma care standards and protocols within the capability of the facility. A Level III trauma facility shall notify the regional emergency healthcare community when a usually-provided service, either "essential" or "desired", is not available.

Advanced (Level III) Trauma Facility
Standards (cont.)

10. The major or severe trauma patient shall be met on arrival in the ED by a team of healthcare professionals as defined in the trauma activation protocols, credentialed by the hospital. The emergency physician shall direct the resuscitation until the arrival of the general surgeon.

11. Throughout their hospital stay, trauma patients shall be cared for by health care professionals with documented education and skill in the assessment and care of injuries.

12. The major or severe trauma patient shall be rapidly assessed, resuscitated, and stabilized according to established trauma management guidelines including ATLS, TNCC, ATCN, and ENPC.

13. Persons who have been involved in a high-energy event that results in a high index of suspicion for major or severe injury shall be evaluated expeditiously upon arrival by the emergency physician to determine if a surgical consult is necessary. Surgical consultations shall occur at the time of injury identification.

14. Disposition decisions shall be made expeditiously by a physician at the hospital and preparations for transfer or admission begun as soon as possible after arrival at the facility.

15. Major or severe trauma patients who are intentionally retained longer than 2 hours, except where medically appropriate, shall receive the same level of care as the highest available within its TSA or within the TSA to which the patient's condition warrants transfer-out.

16. The trauma medical director (TMD) shall formally review trauma panel members on an annual basis, to include at a minimum the review of number of admissions, deaths, complications, audit filter fallouts, and timeliness of response to trauma activations and consults.

17. All healthcare professionals participating in the care of major or severe trauma patients shall participate in the PI program, and each discipline shall have representation at PI meetings.

18. All major or severe trauma patients' charts, including autopsy results when available, shall be reviewed concurrently and retrospectively by the trauma program's PI process for appropriateness and quality of care provided by the hospital. Deviations from standards shall be addressed through a documented trauma PI process.

19. Standards and time frames for trauma registry data entry shall be developed, and shall be no longer than 45 days after the patient's hospital discharge date.

20. The Texas Hospital Data Set essential items shall be electronically submitted to the State EMS/Trauma Registry on at least a quarterly basis, either directly or through a regional registry. Final autopsy results shall be included in the hospital trauma registry.

21. A Level III trauma facility shall participate in the PI program of the RAC in the TSA where it is located, and shall also participate as requested by executive boards, in the PI program of RACs into which the facility has transferred a patient.

Figure: 25 TAC §157.125(x)(2)

Advanced (Level III) Trauma Facility
Audit Filters

1. Absence of an EMS patient care report on the medical record for a patient transported by pre-hospital EMS personnel.

2. EMS scene time of greater than 20 minutes.

3. Absence of pre-hospital essential data items on EMS patient care report.

4. No, or absence of documentation of, trauma team activation for a potential major or severe trauma patient per protocol.

5. Trauma team member response times of greater than 10 minutes for those in-house or greater than 30 minutes for those off-site.

6. Absence of a trauma flow sheet.

7. Absence of documentation of trauma team response times, mechanism of injury, assessments, interventions, and response to interventions.

8. Absence of at least hourly documentation of blood pressure, pulse, respirations, Glasgow coma scale (GCS), and fluid intake and output for a major or severe trauma patient, beginning with arrival in the emergency department (ED), including time spent in radiology, up to admission, death, or transfer.

9. Absence of documented temperature on arrival, discharge, intra-operatively and when indicated.

10. Resuscitation protocol, treatment protocols, and/or standards of care not followed.

11. A patient with a GCS of less than 14 did not receive a CT of the head.

12. A comatose patient (GCS of 8 or less) leaving the ED before a definitive airway is established.

13. Required equipment, which is shared with other departments (i.e. fluid warmer), is not immediately available when requested.

14. Absence of physician notes, including daily physician notes on admitted trauma patients.

15. Major or severe trauma patients transferred to another health-care facility or admitted to surgery or ICU after spending greater than 2 hours in the ED.

16. A major or severe trauma patient admitted to the hospital under the care of a physician who is not a surgeon.

17. Patient sustaining a gunshot wound to the abdomen who is managed non-operatively.

18. Patient with abdominal injuries and hypotension (systolic BP less than 90 or age-appropriate hypotension) who does not undergo laparotomy within 1 hour of arrival in the ED.

Advanced (Level III) Trauma Facility
Audit Filters (cont.)

19. Patient undergoing laparotomy performed greater than 4 hours after arrival in the ED.

20. Patient with epidural or subdural brain hematoma receiving craniotomy greater than 4 hours after arrival at the ED, excluding those performed for ICP monitoring.

21. Interval of greater than 8 hours between arrival and the initiation of debridement of an open fracture.

22. Abdominal, thoracic, vascular, or cranial surgery performed greater than 24 hours after arrival.

23. Non-fixation of femoral diaphyseal fracture in an adult trauma patient.

24. Patient requiring re-intubation of the airway within 48 hours of extubation.

25. Selected in-patient complications monitored as trends or sentinel events.

26. All delays in identification of injuries.

27. Major or severe trauma patient admitted to OR, ICU, or inpatient and then transferred to a higher level of care.

28. Denials of acceptance by a higher level of care facility.

29. Major or severe trauma patient transferred to a non-designated or lower level designated facility.

30. Diversion of major or severe trauma patients and/or denial of transfers-in from other facilities.

31. All trauma deaths.

Figure: 25 TAC §157.125(y)

BASIC (LEVEL IV) TRAUMA FACILITY CRITERIA

Basic Trauma Facility (Level IV) - provides resuscitation, stabilization, and arranges for appropriate transfer of major and severe trauma patients to a higher level trauma facility when medically necessary; provides ongoing educational opportunities in trauma related topics for health care professionals and the public, and implements targeted injury prevention programs (see attached standards). The administrative commitment of a Level IV trauma facility includes developing processes that define the trauma patient population evaluated by the facility and track them throughout the course of their stay in order to maximize funding opportunities.

A. TRAUMA PROGRAM	
1. An identified Trauma Medical Director (TMD) who: ▪ is currently credentialed in Advanced Trauma Life Support (ATLS) or an equivalent course approved by the Department of State Health Services (DSHS). ▪ is charged with overall management of trauma services provided by the hospital. ▪ shall have the authority and responsibility for the clinical oversight of the trauma program. This is accomplished through mechanisms that may include: credentialing of medical staff who provide trauma care; providing trauma care; developing treatment protocols; cooperating with the nursing administration to support the nursing needs of the trauma patients; coordinating the performance improvement (PI) peer review; and correcting deficiencies in trauma care. a. There shall be a defined job description and organizational chart delineating the TMD's role and responsibilities. b. The TMD shall be credentialed by the hospital to participate in the resuscitation and treatment of trauma patients using criteria to include such things as board-certification/board-eligibility, trauma continuing medical education, compliance with trauma protocols, and participation in the trauma PI program. c. The TMD shall participate in a leadership role in the hospital, community, and emergency management (disaster) response committee. d. The TMD should participate in the development of the regional trauma system plan.	E
2. An identified Trauma Nurse Coordinator/Trauma Program Manager (TNC/TPM) who: ▪ is a registered nurse. ▪ has successfully completed and is current in the Trauma Nurse Core Course (TNCC) or Advanced Trauma Course for Nurses (ATCN) or a DSHS-approved equivalent. ▪ has successfully completed and is current in a nationally recognized pediatric advanced life support course ((e.g. Pediatric Advanced Life Support (PALS) or the Emergency Nurse Pediatric Course (ENPC)). ▪ has the authority and responsibility to monitor trauma patient care from emergency deparment (ED) admission through operative intervention(s), ICU care, stabilization, rehabilitation care, and discharge, including the trauma PI program. a. There shall be a defined job description and organizational chart delineating the TNC/TPM's role and responsibilities.	E

	b. The TNC/TPM shall participate in a leadership role in the hospital, community, and regional emergency management (disaster) response committee. c. Trauma programs should have a minimum of .8 FTE dedicated to the TNC/TPM position. d. The TNC/TPM should complete a course designed for his/her role which provides essential information on the structure, process, organization and administrative responsibilities of a PI program to include a trauma outcomes and performance improvement course ((e.g. Trauma Outcomes Performance Improvement Course (TOPIC) or Trauma Coordinators Core Course (TCCC)).	
3.	An identified Trauma Registrar who has appropriate training ((e.g. the Association for the Advancement of Automotive Medicine (AAAM) course, American Trauma Society (ATS) Trauma Registrar Course)) in injury severity scaling. Typically, one full-time equivalent (FTE) employee dedicated to the registry shall be required to process approximately 500 patients annually.	D
4.	Written protocols, developed with approval by the hospital's medical staff, for: a. Trauma team activation b. Identification of trauma team responsibilities during a resuscitation c. Resuscitation and Treatment of trauma patients d. Triage, admission and transfer of trauma patients	E

B. PHYSICIAN SERVICES		
1.	**Emergency Medicine** - this requirement may be fulfilled by a physician credentialed by the hospital to provide emergency medical services. Any emergency physician who is providing trauma coverage shall be credentialed by the TMD to participate in the resuscitation and treatment of trauma patients of all ages to include requirements such as current board certification/eligibility, an average of 9 hours of trauma-related continuing medical education per year, compliance with trauma protocols, and participation in the trauma PI program. An Emergency Medicine board-certified physician who is providing trauma coverage shall have successfully completed an ATLS Student Course or a DSHS-approved ATLS equivalent course. Current ATLS verification is required for all physicians who work in the ED and are not board certified in Emergency Medicine. The emergency physician representative to the multidisciplinary committee that provides trauma coverage to the facility shall attend 50% or greater of multidisciplinary and peer review trauma committee meetings.	E
2.	**Radiology**	D
3.	**Anesthesiology** - requirements may be fulfilled by a member of the anesthesia care team credentialed in assessing emergent situations in trauma patients and providing any indicated treatment.	D

4.	**Primary Care Physician** - The patient's primary care physician should be notified at an appropriate time.	D

C.	**NURSING SERVICES (for all Critical Care and Patient Care Areas)**	
1.	All nurses caring for trauma patients throughout the continuum of care have ongoing documented knowledge and skill in trauma nursing for patients of all ages to include trauma specific orientation, annual clinical competencies, and continuing education.	E
2.	Written standards on nursing care for trauma patients for all units (i.e. ED, ICU, OR, PACU, general wards) in the trauma facility shall be implemented.	E
3.	A written plan, developed by the hospital, for acquisition of additional staff on a 24 hour basis to support units with increased patient acuity, multiple emergency procedures and admissions (i.e. written disaster plan.)	E
4.	50% of nurses caring for trauma patients should be certified in their area of specialty (e.g. CEN, CCRN, CNRN, etc.)	D

D.	**EMERGENCY DEPARTMENT**	
1.	Physician on-call schedule must be published.	E
2.	Physician with special competence in the care of critically injured patients, who is designated member of the trauma team and who is on-call (if not in-house 24/7) and promptly available within 30 minutes of request from inside or outside the hospital.* *Neither a hospital's telemedical capabilities nor the physical presence of physician assistants (PAs) or clinical nurse specialists/nurse practitioners (CNSs/NPs) shall satisfy this requirement. Additionally, PAs/NPs and telemedicine-support physicians who participate in the care of major/severe trauma patients shall be credentialed by the hospital to participate in the resuscitation and treatment of said trauma patients, to include requirements such as board certification/eligibility, an average of 9 hours of trauma-related continuing medical education per year, compliance with trauma protocols, and participation in the trauma PI program.	E
3.	The physician on duty or on-call to the emergency department (ED) shall be activated on EMS communication with the ED or after a primary assessment of patients who arrive to the ED by private vehicle for the major or severe trauma patient. Response time shall not exceed thirty minutes from notification (this criterion shall be monitored in the trauma PI program.)	E
4.	A minimum of one and preferably two registered nurses who have trauma nursing training shall participate in initial major trauma resuscitations.	E
5.	Nurse staffing in initial resuscitation area is based on patient acuity and trauma team composition based on historical census and acuity data.	E
6.	At least one member of the registered nursing staff responding to the trauma team activation for a major or severe trauma resuscitation has successfully completed and holds current credentials in an advanced cardiac life support course (e.g. ACLS or hospital equivalent), a nationally recognized pediatric advanced life support course (e.g. PALS or ENPC) and TNCC or ATCN or a DSHS-approved equivalent.	E

7.	100% of nursing staff have successfully completed and hold current credentials in an advanced cardiac life support course (e.g. ACLS or hospital equivalent), a nationally recognized pediatric advanced life support course (e.g. PALS or ENPC) and TNCC or ATCN or a DSHS-approved equivalent, within 18 months of date of employment in the ED or date of designation.	E
8.	Nursing documentation for trauma patients is systematic and meets the trauma registry guidelines.	E
9.	Two-way communication with all pre-hospital emergency medical services vehicles.	E
10.	Equipment and services for the evaluation and resuscitation of, and to provide life support for, critically or seriously injured patients of all ages shall include but not be limited to:	E
	a. Airway control and ventilation equipment including laryngoscope and endotracheal tubes of all sizes, bag-valve-mask devices (BVMs), pocket masks, and oxygen	E
	b. Mechanical ventilator	E
	c. Pulse oximetry	E
	d. Suction devices	E
	e. Electrocardiograph - oscilloscope - defibrillator	E
	f. Supraglottic airway management device (e.g. LMA)	D
	g. Apparatus to establish central venous pressure monitoring equipment	D
	h. All standard intravenous fluids and administration devices, including large-bore intravenous catheters and a rapid infuser system	E
	i. Sterile surgical sets for procedures standard for the emergency room such as thoracostomy, venous cutdown, central line insertion, thoracotomy, airway control/cricothyrotomy, etc.	E
	j. Drugs and supplies necessary for emergency care	E
	k. Cervical spine stabilization device	E
	l. Length-based body weight & tracheal tube size evaluation system (such as Broselow tape) and resuscitation medications and equipment that are dose-appropriate for all ages	E
	m. Long bone stabilization device	E
	n. Pelvic stabilization device	E
	o. Thermal control equipment for patients and a rapid warming device for blood and fluids	E
	p. Non-invasive continuous blood pressure monitoring devices	E
	q. Qualitative end tidal CO_2 monitor	
11.	X-ray capability.	E

E.	**CLINICAL LABORATORY SERVICE (available 24 hours per day)**	
1.	Call-back process for trauma activations available within 30 minutes. This system shall be continuously monitored in the trauma PI program.	E
2.	Standard analyses of blood, urine, and other body fluids, including microsampling.	E
3.	Blood typing and cross-matching.	D
4.	Capability for immediate release of blood for a transfusion and a protocol to obtain additional blood supply.	E

5.	Coagulation studies.	E
6.	Blood gases and pH determinations.	E
7.	Drug and alcohol screening - toxicology screens need not be immediately available but are desirable (if available, results should be included in all trauma PI reviews.)	D

F. RADIOLOGICAL CAPABILITIES (available 24 hours per day)		
1.	Call-back process for trauma activations available within 30 minutes. This system shall be continuously monitored in the trauma PI program.	E
2.	24-hour coverage by in-house technician.	D
3.	Computerized tomography.	D

G. PERFORMANCE IMPROVEMENT		
1.	Track record: On Initial Designation: a facility must have completed at least six months of audits on all qualifying trauma records with evidence of "loop closure" on identified issues. Compliance with internal trauma policies must be evident. On Re-designation: a facility must show continuous PI activities throughout its designation and a rolling current three year period must be available for review at all times.	E
2.	Minimum inclusion criteria: All trauma team activations (including those discharged from the ED), all trauma deaths or dead on arrivals (DOAs), all major and severe trauma admissions; transfers-in and transfers-out; and readmissions within 48 hours after discharge.	E
3.	An organized trauma PI program established by the hospital, to include a pediatric-specific component and trauma audit filters (see "Basic Trauma Facility Audit Filters" list.)	E
	a. Audit of trauma charts for appropriateness and quality of care.	E
	b. Documented evidence of identification of all deviations from trauma standards of care, with in-depth critical review.	E
	c. Documentation of actions taken to address all identified issues.	E
	d. Documented evidence of participation by the TMD.	E
	e. Morbidity and mortality review including decisions by the TMD as to whether or not standard of care was met.	E
	f. Documented resolutions "loop closure" of all identified issues to prevent future recurrences.	E
	g. Special audit for all trauma deaths and other specified cases, including complications, utilizing age-specific criteria.	E
	h. Multidisciplinary hospital trauma PI committee structure in place.	E
4.	Multidisciplinary trauma conferences, continuing education and problem solving to include documented nursing and pre-hospital participation	D

5.	Feedback regarding major/severe trauma patient transfers-out from the ED and in-patient units shall be obtained from receiving facilities.	E
6.	Trauma registry - data shall be forwarded to the state trauma registry on at least a quarterly basis.	E
7.	Documentation of severity of injury (by Glasgow Comma Scale, revised trauma score, age, injury severity score) and outcome (survival, length of stay, ICU length of stay) with monthly review of statistics.	E
8.	Participation with the regional advisory council's (RAC) PI program, including adherence to regional protocols, review of pre-hospital trauma care, submitting data to the RAC as requested including such things as summaries of transfer denials and transfers to hospitals outside of the RAC.	E
9.	Times of and reasons for diversion must be documented and reviewed by the trauma PI program.	E

H. REGIONAL TRAUMA SYSTEM		
1.	Must participate in the regional trauma system per RAC requirements.	E

I. TRANSFERS		
1.	A process to expedite the transfer of major and severe trauma patients to include such things as written protocols, written transfer agreements, and a regional trauma system transfer plan for patients needing higher level of care or specialty services (i.e. surgery, burns, etc.)	E
2.	A system for establishing an appropriate landing zone in close proximity to the hospital (if rotor wing services are available.)	E

J. PUBLIC EDUCATION/INJURY PREVENTION		
1.	A public education program to address the major injury problems within the hospital's service area. Documented participation in a RAC injury prevention program is acceptable.	E
2.	Coordination and/or participation in community/RAC injury prevention activities.	E

K. TRAINING PROGRAMS		
1.	Formal programs in trauma continuing education provided by hospital for staff based on needs identified from the trauma PI program for:	E
	a. Staff physicians	E
	b. Nurses	E
	c. Allied health personnel, including mid-level providers such as physician assistants and nurse practitioners	E

Figure: 25 TAC §157.125(y)(1)

Basic (Level IV) Trauma Facility
Standards

1. A Level IV Trauma Facility shall be an active participant on the regional advisory council (RAC) of its trauma service area (TSA).

2. A Level IV Trauma Facility is available to stabilize all major and severe trauma patients 24 hours per day/7 days per week. Diversion of such patients to other facilities should be made rarely and only when resources are not available in the emergency department (ED) to stabilize and transfer these patients.

3. A Level IV Trauma Facility shall have an established relationship with the tertiary trauma facility(ies) to which it routinely transfers, to include such things as:
   - written transfer agreements
   - prospective dialogue regarding appropriate pre-transfer diagnostic laboratory and radiological studies so that each is cognizant of the other's performance expectations
   - consideration of a single phone call transfer-request process
   - provision of feedback regarding transfers as part of the performance improvement (PI) program.

4. A Level IV trauma facility shall have age-specific policies/processes that demonstrate knowledge of the special resources potentially needed by injured patients of all ages, and is cognizant of the pediatric capabilities of the hospitals to which it customarily effectuates transfers so that it can determine the most appropriate facility.

5. A Level IV Trauma Facility shall have an established relationship with the EMS providers who transport to the facility to facilitate adequate pre-arrival notification, appropriate documentation, and appropriate pre-hospital care.

6. The patient shall be treated according to current practice per standards and protocols within the capability of the facility. A Level IV trauma facility shall notify the regional emergency healthcare community when a usually-provided service, either "essential" or "desired", is not available.

7. A Level IV trauma facility with on-call general surgeon(s) shall, in close collaboration with the appropriate RAC members, have guidelines that balance its capability to take critical trauma patients to the operating room for life/limb saving procedures with the customary "stabilize and transfer" standard for a Level IV trauma facility without surgical capabilities.

8. The major or severe trauma patient shall be met on arrival in the ED by a team of healthcare professionals as defined in the trauma activation protocols and credentialed by the hospital. When a physician other than the on-call emergency physician participates in the management of care, that physician shall also be credentialed by the hospital and must meet the trauma education requirements of the emergency physician.

9. Throughout their hospital stay, trauma patients shall be cared for by healthcare professionals with documented education and skill in the assessment and care of injuries.

10. The major or severe trauma patient shall be rapidly assessed, resuscitated, and stabilized according to established trauma management guidelines including ATLS, TNCC, ATCN, and ENPC.

Basic (Level IV) Trauma Facility
Standards (cont.)

11. Disposition decisions shall be made expeditiously by a physician at the hospital and preparations for transfer begun as soon as possible after arrival at the facility.

12. Major or severe trauma patients who are intentionally retained longer than 2 hours, except where medically appropriate, shall receive the same level of care as the highest available within its TSA or within the TSA to which the patient's condition warrants transfer-out.

13. All healthcare professionals participating in the care of major or severe trauma patients must participate in the PI program, and each discipline shall have representation at PI meetings.

14. The medical records of all major and severe trauma patients, including autopsy results when available, shall be reviewed concurrently and retrospectively by the trauma program's PI process for appropriateness and quality of care. Deviations from standards of care shall be addressed through a documented trauma PI process.

15. Standards and time frames for trauma registry data entry and abstraction of PI issues shall be developed, and shall be no longer than 45 days after the patient's hospital discharge date.

16. The Texas Hospital Standard Data Set essential items shall be uploaded to the State EMS/Trauma Registry on at least a quarterly basis.

17. A Level IV trauma facility shall participate in the PI program of the RAC in the TSA where it is located, and shall also participate as requested by executive boards in the PI program of RACs into which the facility has transferred a patient.

18. The appropriateness of transferring-out major or severe trauma patients presenting to the ED of a Level IV trauma facility with on-call surgeon(s) shall be subject to 100% review in the hospital's PI program.

Figure: 25 TAC §157.125(y)(2)

Basic (Level IV) Trauma Facility
Audit Filters

1. Absence of an EMS report on the medical record for a patient transported by pre-hospital EMS personnel.

2. EMS scene time of greater than 20 minutes.

3. Absence of pre-hospital essential data items on EMS patient care report.

4. No, or absence of documentation of, trauma team activation for a potential major or severe trauma patient per protocol.

5. Trauma team member response times of greater than 10 minutes for those in-house or greater than 30 minutes for those off-site.

6. Absence of a trauma flow sheet.

7. Absence of documentation of trauma team response times, mechanism of injury, assessments, interventions, and response to interventions.

8. Absence of at least hourly documentation of blood pressure, pulse, respirations, Glasgow coma scale (GCS), and fluid intake and output for a major or severe trauma patient, beginning with arrival in the emergency department (ED), including time spent in radiology, up to admission, death, or transfer.

9. Absence of documented temperature on arrival, discharge and when indicated.

10. Resuscitation protocol, treatment protocols, and/or standards of care not followed.

11. A comatose patient (GCS of 8 or less) leaving the ED before a definitive airway is established.

12. Required equipment, which is shared with in-house departments (e.g. fluid warmer), not readily available when requested.

13. Absence of physician notes.

14. Patient admitted to surgery or ICU.

15. All delays in identification of injuries.

16. Patient transferred to another health-care facility after spending greater than 2 hours in the ED.

17. Patient admitted to the hospital then transferred to a higher level of care.

18. Major or severe (hemodynamically unstable) trauma patient transferred-out when a general surgeon was on-call to the ED.

19. Denial of acceptance by a higher level of care facility.

Basic (Level IV) Trauma Facility
Audit Filters (cont.)

20. Major or severe trauma patient transferred to a non-designated facility.

21. Diversion of major or severe trauma patients.

22. All trauma deaths.

23. Patient admitted without being examined by a physician.

Figure: 40 TAC §92.559

ADMINISTRATIVE PENALTY SCHEDULE	SMALL FACILITY (4 - 16 beds)		LARGE FACILITY (17+ beds)	
	Business entity owns one facility	Business entity owns multiple facilities	Business entity owns one facility	Business entity owns multiple facilities
§92.2. Basis and Scope	$300	$450	$500	$650
§92.4. Types of Assisted Living Facilities	$300	$450	$500	$650
§92.10. Criteria for Licensing	$300	$450	$500	$650
§92.11. Building Approval	$250	$350	$450	$550
§92.14. Increase in Capacity	$300	$400	$500	$600
§92.15. Renewal Procedures and Qualifications	$300	$400	$500	$600
§92.16. Change of Ownership	$300	$400	$500	$600
§92.20. License Fees	$300	$400	$500	$600
§92.21. Advertisements, Solicitations, and Promotional Material	$250	$350	$450	$550
§92.41. Standards for Type A, Type B, and Type E Assisted Living Facilities				
(a) employees	$350	$550	$750	$950
(b) social services	$200	$300	$400	$500
(c) resident assessment	$400	$550	$600	$750
(d) resident policies	$250	$350	$450	$550
(e) admission policies	$300	$400	$500	$600
(f) inappropriate placement in Type A or Type B facilities	Not applicable	Not applicable	Not applicable	Not applicable
(g) advance directives	$500	$500	$500	$500
(h) resident records	$200	$300	$400	$500
(i) personnel records	$200	$300	$400	$500
(j) medications	$400	$500	$600	$700
(k) accident, injury, or acute illness	$400	$500	$600	$700
(l) resident finances	$200	$300	$400	$500
(m) food and nutrition services	$400	$550	$700	$850
(n) infection control	$400	$550	$700	$850
(o) access to residents	$150	$200	$250	$300
(p) restraints	$700	$800	$900	$1,000
(q) accreditation status	$700	$800	$900	$1,000
§92.51. Licensure of Facilities for Persons with Alzheimer's Disease	$200	$300	$400	$500
§92.53. Standards for Certified Alzheimer's Assisted Living Facilities	$400	$500	$600	$700
§92.61. Facility Construction-Introduction and Application	$300	$400	$500	$600
§92.62. General Requirements	$350	$450	$550	$650

§92.71. Introduction and Application: Type E Facilities	$300	$400	--	--
§92.72. General Requirements: Type E Facilities	$300	$400	--	--
§92.81. Inspections and Surveys	$300	$400	$500	$600
§92.82. Determinations and Actions Pursuant to Inspections	$200	$300	$400	$500
§92.102. Abuse, Neglect, Exploitation Reportable to DHS by Facilities	$700	$800	$900	$1,000
§92.123. Investigation of Facility Employees	$450	$550	$650	$750
§92.125. Resident's Bill of Rights and Provider Bill of Rights				
(a) resident's bill of rights	--	--	--	--
(1) post and provide copy of bill	$100	$150	$200	$250
(2) right to exercise civil rights	$150	$200	$250	$300
(3) each resident has the right to:	--	--	--	--
(A) be free from physical, mental abuse, corporal punishment, physical, chemical restraints for discipline/convenience	$700	$800	$900	$1,000
(B) participate in activities	$150	$200	$250	$300
(C) religion of choice	$150	$200	$250	$300
(D) if MR, participate in behavior modification with guardian consent	$150	$200	$250	$300
(E)(i) - (iii)--be treated with respect, consideration, dignity	$200	$250	$300	$350
(F) safe, decent living environment	$100	$150	$200	$250
(G) communicate in native language	$100	$150	$200	$250
(H) complain about care, treatment	$200	$250	$300	$350
(I) receive and send mail	$100	$150	$200	$250
(J) unrestricted communication	$150	$200	$250	$300
(K) make community contacts	$100	$150	$200	$250
(L) manage financial affairs	$100	$150	$200	$250
(M)(i) - (ii) access resident records	$100	$150	$200	$250
(N) choose physician and be informed about treatment and care	$100	$150	$200	$250
(O) help develop individual service plan	$100	$150	$200	$250
(P)(i) - (ii) opportunity to refuse medical treatment or services	$100	$150	$200	$250

(Q) unaccompanied access to telephone	$100	$150	$200	$250
(R) privacy	$100	$150	$200	$250
(S) retain and use personal possessions	$100	$150	$200	$250
(T) determine personal preference in dress, hair style, personal effects	$100	$150	$200	$250
(U) retain and use personal property	$100	$150	$200	$250
(V) refuse to perform services	$100	$150	$200	$250
(W)(i)-(ii) be informed about Medicare, Medicaid, and covered items/services	$100	$150	$200	$250
(X)(i)-(v) not be transferred/discharged except under specific conditions	$300	$350	$400	$450
(Y)(i)-(v) not be transferred/discharged except in an emergency without specific written notice	$300	$350	$400	$450
(Z) leave facility temporarily or permanently	$100	$150	$200	$250
(AA) access the Ombudsman program	$100	$150	$200	$250
(BB) execute an advance directive or designate a guardian for decisions	$200	$250	$300	$350
§92.127. Required Posting	$250	$350	$450	$550
§92.129. Authorized Electronic Monitoring (AEM)	$100	$150	$200	$250
§§92.351 - 92.374. Emergency License Suspension and Closing Order	$150	$250	$350	$450
§§92.551 - 92.595. Administrative Penalties	$400	$500	$600	$700

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Texas State Affordable Housing Corporation

Notice of Public Hearing Regarding the Issuance of Bonds

Notice is hereby given of a public hearing to be held by the Texas State Affordable Housing Corporation (the "Issuer") at 12:00 p.m. on January 11, 2007 at 1005 Congress Avenue, Suite 500 (Conference Room), Austin, Texas 78701, on the proposed issuance by the Issuer of one or more series of revenue bonds (the "Bonds") to provide financing for the acquisition of single family mortgages in the State of Texas, pursuant to: (i) its professional educators home loan program (the "Professional Educators Project"), (ii) its fire fighter and law enforcement or security officer home loan program (the "Fire Fighter and Law Enforcement or Security Officer Project"), and (iii) its nursing faculty home loan program (the "Nursing Faculty Project"). The maximum aggregate face amount of the Bonds to be issued with respect to the Professional Educators Project is $101,750,929; the maximum aggregate face amount of the Bonds to be issued with respect to the Fire Fighter and Law Enforcement or Security Officer Project is $25,000,000; and the maximum aggregate face amount of the Bonds to be issued with respect to the Nursing Faculty Project is $5,000,000. All interested persons are invited to attend the public hearing to express orally, or in writing, their views on the Professional Educators Project, the Fire Fighter and Law Enforcement or Security Officer Project, the Nursing Faculty Project, and the issuance of the Bonds. The Bonds shall not constitute or create an indebtedness, general or specific, or liability of the State of Texas, or any political subdivision thereof. The Bonds shall never constitute or create a charge against the credit or taxing power of the State of Texas, or any political subdivision thereof. Neither the State of Texas nor any political subdivision thereof shall in any manner be liable for the payment of the principal of or interest on the Bonds or for the performance of any agreement or pledge of any kind which may be undertaken by the Issuer, and no breach by the Issuer of any agreements will create any obligation upon the State of Texas or any political subdivision thereof.

Further information with respect to the proposed Bonds will be available at the hearing or upon written request prior thereto addressed to David Long at the Texas State Affordable Housing Corporation, 1005 Congress Avenue, Suite 500, Austin, Texas 78701; 1-888-638-3555, ext. 402.

Individuals who require auxiliary aids in order to attend this meeting should contact Laura Smith, ADA Responsible Employee, at 1-888-638-3555, ext. 400 through Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Individuals may transmit written testimony or comments regarding the subject matter of this public hearing to David Long at dlong@tsahc.org.

TRD-200606598
David Long
President
Texas State Affordable Housing Corporation
Filed: December 11, 2006

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Capital Area Rural Transportation System

Request for Qualifications - Architectural/Engineering Services

The Capital Area Rural Transportation System (CARTS) is soliciting Statements of Qualification from architectural/engineering firms for the design and construction of an Intermodal Transit Facility in Georgetown, Texas. The Request for Qualifications, which sets forth further details, may be requested by submitting an e-mail with the subject line "RFQ GT Intermodal" to the following address: Dave@RideCARTS.com.

TRD-200606616
Dave Marsh
General Manager
Capital Area Rural Transportation System
Filed: December 12, 2006

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of December 1, 2006, through December 7, 2006. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for these activities extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on December 13, 2006. The public comment period for these projects will close at 5:00 p.m. on January 12, 2007.

FEDERAL AGENCY ACTIONS:

Applicant: Douglas Finn; Location: The project site is located along the eastern bank of the San Jacinto River, at 1904 Main Street, north of Interstate Highway 10, in Harris County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Highlands, Texas. Approximate UTM Coordinates in NAD 27 (meters): Zone 15; Easting: 301408; Northing: 3297161. Project Description: The applicant is requesting authorization to retain fill material discharged into waters of the United States to provide shoreline stabilization. Approximately 140 cubic yards of fill material was discharged into 0.12 acre of open water habitat as a result of the unauthorized activity. The riprap was placed 50 feet waterward of the existing shoreline. No wetlands or vegetated shallows were impacted. CCC Project No.: 07-0066-F1; Type of Application: U.S.A.C.E. permit application #23988 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas

Commission on Environmental Quality under §401 of the Clean Water Act.

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451-1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200606622
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: December 12, 2006

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Comptroller of Public Accounts

Notice of Legal Banking Holidays

Texas Tax Code Annotated §111.053(b) requires that, before January 1 of each year, the Comptroller of Public Accounts publish a list of the legal holidays for banking purposes for that year. This is the Eleventh District Holiday Schedule. Pursuant to the Federal Reserve Bank of Dallas Notice 06-41 dated August 2, 2006. The Federal Reserve Bank of Dallas and its branches at El Paso, Houston, and San Antonio, Texas, will observe the following holidays for calendar year 2007 and will not be open on the dates indicated below.

Monday, January 1, New Year's Day

Monday, January 15, Martin Luther King, Jr. Day

Monday, February 19, Presidents Day

Monday, May 28, Memorial Day

Wednesday, July 4, Independence Day

Monday, September 3, Labor Day

Monday, October 8, Columbus Day

Monday, November 12, Veterans Day

Thursday, November 22, Thanksgiving Day

Tuesday, December 25, Christmas Day

The Federal Reserve standard holiday schedule mandates that if January 1, July 4, November 11, or December 25 falls on a Sunday, the following Monday will be observed as a holiday. If January 1, July 4, November 11, or December 25 occurs on a Saturday, the preceding Friday will not be observed as a holiday.

For the year 2007, November 11 falls on a Sunday; therefore, Monday, November 12, will be observed as a holiday. No holidays fall on Saturday in 2007.

TRD-200606596
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: December 11, 2006

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/18/06 - 12/24/06 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 12/18/06 - 12/24/06 is 18% for Commercial over $250,000.

[1] Credit for personal, family or household use.

[2] Credit for business, commercial, investment or other similar purpose.

TRD-200606617
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: December 12, 2006

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **January 22, 2007**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on January 22, 2007**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Dung Van Le dba 1.19 Super Cleaners; DOCKET NUMBER: 2006-1417-DCL-E; IDENTIFIER: Regulated Entity Reference Number (RN) RN100898592; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaners; RULE VIOLATED: 30 Texas Administrative Code (TAC) §337.10(a) and Texas Health & Safety Code (THSC), §374.102, by failing to complete

and submit the required registration form; PENALTY: $1,209; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 5424 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Brian Le dba 1.25 Brian Cleaners; DOCKET NUMBER: 2006-1172-DCL-E; IDENTIFIER: RN104966445; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 5424 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(3) COMPANY: Henry Janer dba 1.35 Cleaners; DOCKET NUMBER: 2006-1214-DCL-E; IDENTIFIER: RN104990056; LOCATION: Spring, Harris County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5424 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: Baek You dba 2 EZ Cleaners; DOCKET NUMBER: 2006-1463-DCL-E; IDENTIFIER: RN105010383; LOCATION: Killeen, Bell County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(5) COMPANY: Acme Brick Company; DOCKET NUMBER: 2006-1751-AIR-E; IDENTIFIER: RN100225184; LOCATION: Millsap, Parker County, Texas; TYPE OF FACILITY: brick manufacturing; RULE VIOLATED: 30 TAC §122.145(2)(B), Federal Operating Permit (FOP) Number O-01597, General Terms and Conditions, and THSC, §382.085(b), by failing to submit a semi-annual deviation report; PENALTY: $2,400; ENFORCEMENT COORDINATOR: Jessica Rhodes, (512) 239-2879; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(6) COMPANY: Ahad Business, Inc. dba 1.45 Cleaners and dba Budget Cleaners; DOCKET NUMBER: 2006-1523-DCL-E; IDENTIFIER: RN104988399 and RN104988407; LOCATION: Sugar Land, Fort Bend County, Texas; TYPE OF FACILITY: dry cleaning drop stations; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form for the facilities; PENALTY: $2,370; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(7) COMPANY: Austin White Lime Company; DOCKET NUMBER: 2006-1714-AIR-E; IDENTIFIER: RN100214337; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: lime production plant; RULE VIOLATED: 30 TAC §122.121 and THSC, §382.085(b), by failing to obtain a FOP to operate a major source of emissions; PENALTY: $2,450; ENFORCEMENT COORDINATOR: Bryan Elliott, (512) 239-6162; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(8) COMPANY: B & D Kim Corporation dba Ace Cleaners; DOCKET NUMBER: 2006-1353-DCL-E; IDENTIFIER: RN103970588; LOCATION: Coppell, Dallas County, Texas; TYPE OF FACILITY: dry cleaner; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the registration by completing and submitting the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: Stepano Young Kim, Jr. dba Brookhaven Cleaners; DOCKET NUMBER: 2006-1270-DCL-E; IDENTIFIER: RN102801354; LOCATION: Addison, Dallas County, Texas; TYPE OF FACILITY: dry cleaner; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay dry cleaner registration fees; PENALTY: $880; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Nicolos T. Ponce dba Bryan CS Cleaners; DOCKET NUMBER: 2006-1359-DCL-E; IDENTIFIER: RN104964135 and RN104964317; LOCATION: Bryan and College Station, Brazos County, Texas; TYPE OF FACILITY: dry cleaning and/or drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the registration by completing and submitting the required registration form for the facilities; PENALTY: $1,778; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 754-0335.

(11) COMPANY: C. Kun, Corp. dba One Hour Martinizing; DOCKET NUMBER: 2006-0788-DCL-E; IDENTIFIER: RN103967691; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: dry cleaner; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Cheryl Thompson, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(12) COMPANY: Jackie Rainey and Mark J. Rainey dba Classic Cleaners; DOCKET NUMBER: 2006-1336-DCL-E; IDENTIFIER: RN104408190 and RN101870996; LOCATION: McAllen, Hidalgo County, Texas; TYPE OF FACILITY: dry cleaning and/or drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the registration by completing and submitting the required registration form for the facilities; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay dry cleaner registration and late fees; PENALTY: $2,370; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(13) COMPANY: Classic Marble Company; DOCKET NUMBER: 2004-1862-WQ-E; IDENTIFIER: RN101205383; LOCATION: Austin, Travis County, Texas; TYPE OF FACILITY: manufacturer of cut-stone products; RULE VIOLATED: 30 TAC §281.25(a)(4) and 40 Code of Federal Regulations (CFR) §122.26(a), by failing to obtain authorization to discharge storm water associated with industrial activity; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Brent Hurta, (512) 239-6589; REGIONAL OFFICE: 1921 Cedar Bend Drive, Suite 150, Austin, Texas 78758-5336, (512) 339-2929.

(14) COMPANY: Copano Processing, L.P.; DOCKET NUMBER: 2006-1601-AIR-E; IDENTIFIER: RN101271419; LOCATION: Sheridan, Colorado County, Texas; TYPE OF FACILITY: natural gas processing, dehydration, and fractionation plant; RULE VIOLATED: 30 TAC §§116.115(c), 122.143(4), and 122.145(2)(B), FOP Number O-00871, General Terms and Conditions, and THSC, §382.085(b), by failing to submit a semi-annual deviation report; PENALTY: $2,800; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: Corporate Cleaners & Laundry, LLC and Gerald Grimes dba Corporate Cleaners & Laundry; DOCKET NUMBER: 2006-1356-DCL-E; IDENTIFIER: RN104247861; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: dry cleaner; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the registration by completing and submitting the required registration form; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay dry cleaner registration fees; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(16) COMPANY: Alvin G. Randolph dba Crown Cleaners; DOCKET NUMBER: 2006-1620-DCL-E; IDENTIFIER: RN105004022; LOCATION: Beaumont, Jefferson County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(17) COMPANY: Crown Cork & Seal USA, Inc.; DOCKET NUMBER: 2006-1522-AIR-E; IDENTIFIER: RN100711118; LOCATION: Conroe, Montgomery County, Texas; TYPE OF FACILITY: can manufacturing; RULE VIOLATED: 30 TAC §116.115(c), New Source Review Permit Number 75271, Special Condition 3, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $3,875; ENFORCEMENT COORDINATOR: Sherronda Martin, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(18) COMPANY: Paul Martin Moore III dba D & M Cleaners; DOCKET NUMBER: 2006-1477-DCL-E; IDENTIFIER: RN103771911; LOCATION: Edinburg, Hidalgo County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(19) COMPANY: D & M Cleaners, Inc. dba D & M Cleaners; DOCKET NUMBER: 2006-1580-DCL-E; IDENTIFIER: RN104000278; LOCATION: McAllen, Hidalgo County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Cari-Michel LaCaille, (512) 239-1387; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(20) COMPANY: Dry Clean Express, Inc. dba Cache Cleaners, dba One Hour Cleaners and dba Professional Cleaners; DOCKET NUMBER: 2006-1360-DCL-E; IDENTIFIER: RN104966726, RN104987516, RN103994331, and RN104992516; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaning and/or drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the registration by completing and submitting the required registration form for the facilities; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay dry cleaner registration late fees; PENALTY: $4,740; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: Brad Ewing and Judy Ewing dba Dry Clean Super Center; DOCKET NUMBER: 2006-1487-DCL-E; IDENTIFIER: RN105008593; LOCATION: Hamilton, Hamilton County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Thomas Greimel, (512) 239-5690; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(22) COMPANY: City of Eastland; DOCKET NUMBER: 2006-1627-MWD-E; IDENTIFIER: RN101919314; LOCATION: Eastland, Eastland County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010637001 Interim Effluent Limitations and Monitoring Requirements Number 1, and the Code, §26.121(a), by failing to comply with its permitted effluent limits; PENALTY: $1,490; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(23) COMPANY: Ruben N. McNeely dba Freshen Clean; DOCKET NUMBER: 2006-1343-DCL-E; IDENTIFIER: RN104964093; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay outstanding dry cleaner fees; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Alison Echlin, (512) 239-3308; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (512) 588-5800.

(24) COMPANY: Feroz Panjwani dba Handi Plus 44; DOCKET NUMBER: 2006-1303-PST-E; IDENTIFIER: RN102793577; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.50(b)(2)(A), (b)(2)(A)(i)(III), and (d)(4)(A)(ii)(II) and the Code, §26.3475(a) and (c)(1), by failing to provide release detection, by failing to test the line leak detectors, and by failing to perform an automatic test for substance loss; PENALTY: $4,500; ENFORCEMENT COORDINATOR: Philip DeFrancesco, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: IRSA, Inc. dba 1.50 Cleaners and dba Humble Discount Cleaners; DOCKET NUMBER: 2006-1426-DCL-E; IDENTIFIER: RN104990015 and RN104098918; LOCATION: Houston and Humble, Harris County, Texas; TYPE OF FACILITY: dry cleaner and/or drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form for the facilities; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay dry cleaner registration fees; PENALTY: $1,956; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: Iturrino and Associates, Inc. dba Dry Cleaner Super Center; DOCKET NUMBER: 2006-1321-DCL-E; IDENTIFIER: RN104523485; LOCATION: Keller, Tarrant County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: Heather Anne Jernigan dba Jernigan Cleaners; DOCKET NUMBER: 2006-1501-DCL-E; IDENTIFIER:

RN104102884; LOCATION: Corrigan, Polk County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Jason Godeaux, (512) 239-2541; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(28) COMPANY: Seymour Inn dba Kingwood Cleaners; DOCKET NUMBER: 2006-1209-DCL-E; IDENTIFIER: RN104087283 and RN104087291; LOCATION: Humble, Harris County, Texas; TYPE OF FACILITY: dry cleaners; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the registration by completing and submitting the required registration forms for the facilities; PENALTY: $1,778; ENFORCEMENT COORDINATOR: Craig Fleming, (512) 239-5806; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-5800.

(29) COMPANY: Abdourezak M. Oman dba Lincoln Centre Cleaners; DOCKET NUMBER: 2006-1322-DCL-E; IDENTIFIER: RN104987433; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay outstanding dry cleaner fees; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Colin Barth, (512) 239-0086; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(30) COMPANY: Matthew John Reino dba Lucy's Cleaners; DOCKET NUMBER: 2006-1504-DCL-E; IDENTIFIER: RN104998182; LOCATION: Grapevine, Tarrant County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $1,067; ENFORCEMENT COORDINATOR: Jason Godeaux, (512) 239-2541; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(31) COMPANY: Jaime Granados dba McAllen Cleaners; DOCKET NUMBER: 2006-1375-DCL-E; IDENTIFIER: RN102394061; LOCATION: McAllen, Hidalgo County, Texas; TYPE OF FACILITY: dry cleaner; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Shontay Wilcher, (512) 239-2136; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(32) COMPANY: Mylan Enterprises, Inc. dba Dry Clean Super Center; DOCKET NUMBER: 2006-1435-DCL-E; IDENTIFIER: RN104098934; LOCATION: Plano, Collin County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Suzanne Walrath, (512) 239-2134; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(33) COMPANY: Nash Trucking & Construction Inc.; DOCKET NUMBER: 2006-1913-WQ-E; IDENTIFIER: RN105019947; LOCATION: Avinger, Cass County, Texas; TYPE OF FACILITY: industrial construction; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a multi-sector general permit; PENALTY: $875; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(34) COMPANY: Navico Corp dba Dixie Cleaners and dba Hi Tech Cleaners; DOCKET NUMBER: 2006-1424-DCL-E; IDENTIFIER: RN104102587 and RN103996351; LOCATION: Pearland and Galveston, Brazoria and Galveston Counties, Texas; TYPE OF FACILITY: dry cleaning and/or drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the registration by completing and submitting the required registration form for the facilities; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay dry cleaner registration fees; PENALTY: $2,370; ENFORCEMENT COORDINATOR: Libby Hogue, (512) 239-1165; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(35) COMPANY: Van Thi Pham dba NY Cleaners; DOCKET NUMBER: 2006-1561-DCL-E; IDENTIFIER: RN104983267; LOCATION: Spring, Harris County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; and 30 TAC §337.14(c) and the Code, §5.702, by failing to pay dry cleaner registration fees; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(36) COMPANY: Preston Tiptop Cleaners Inc. dba Tip Top Cleaners 2; DOCKET NUMBER: 2006-1267-DCL-E; IDENTIFIER: RN101460020; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(37) COMPANY: Red Ewald, Inc.; DOCKET NUMBER: 2006-1079-AIR-E; IDENTIFIER: RN100212612; LOCATION: Karnes City, Karnes County, Texas; TYPE OF FACILITY: fiberglass reinforced tanks and piping manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(2), General Operating Permit Number O-01006, General Terms and Conditions, and THSC, §382.085(b), by failing to submit an annual compliance certification; PENALTY: $1,625; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(38) COMPANY: Bennie Taylor dba Reo Cleaners; DOCKET NUMBER: 2006-1405-DCL-E; IDENTIFIER: RN104991617; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Philip DeFrancesco, (817) 588-5800; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(39) COMPANY: Hyo Sun Wonsick dba Sam's Cleaners; DOCKET NUMBER: 2006-1488-DCL-E; IDENTIFIER: RN105010474; LOCATION: Killeen, Bell County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(40) COMPANY: Alberto Bello Sanchez; DOCKET NUMBER: 2006-1253-LII-E; IDENTIFIER: RN104487186; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: landscaping services;

RULE VIOLATED: 30 TAC §30.5(a) and §344.4(a), Texas Occupations Code, §1903.251, and the Code, §37.003, by failing to hold a valid irrigator and installer license; PENALTY: $1,250; ENFORCEMENT COORDINATOR: Catherine Albrecht, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(41) COMPANY: Smile Cleaners Incorporated dba Happy Cleaners; DOCKET NUMBER: 2006-1401-DCL-E; IDENTIFIER: RN104103585; LOCATION: Sugar Land, Fort Bend County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Harvey Wilson, (512) 239-0321; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(42) COMPANY: Southwestern Industrial Contractors and Riggers, Inc.; DOCKET NUMBER: 2006-1311-AIR-E; IDENTIFIER: RN100818863; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: gasoline dispensing station; RULE VIOLATED: 30 TAC §115.252(2) and THSC, §382.085(b), by failing to comply with the seven pounds per square inch absolute maximum Reid vapor pressure requirement for gasoline; PENALTY: $1,200; ENFORCEMENT COORDINATOR: John Muennink, (361) 825-3100; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(43) COMPANY: Tekni-Plex, Inc. dba Dolco Packaging; DOCKET NUMBER: 2006-1130-AIR-E; IDENTIFIER: RN100215508; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: shaped polystyrene foam products manufacturing; RULE VIOLATED: 30 TAC §116.110(a)(1) and THSC, §382.085(b), by failing to renew TCEQ Air Permit Number 17990 prior to expiration; PENALTY: $12,700; ENFORCEMENT COORDINATOR: Roshandra Lowe, (713) 767-3500; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(44) COMPANY: Rokaya Jawaid dba Texas Cleaners; DOCKET NUMBER: 2006-1486-DCL-E; IDENTIFIER: RN104968722; LOCATION: Lewisville, Denton County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $225; ENFORCEMENT COORDINATOR: Judy Kluge, (817) 588-5800; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(45) COMPANY: Texas Department of Transportation; DOCKET NUMBER: 2005-0750-MWD-E; IDENTIFIER: RN102075744 and RN102096823; LOCATION: Palo Pinto and Johnson Counties, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 11311-001, Effluent Limitations and Monitoring Requirements Number 1, TPDES Permit Number 11311-001, Section III Requirements Applying to All Sludge Disposal in a Municipal Solid Waste Landfill, Paragraph G, Reporting Requirements, and 30 TAC §305.121(1), and the Code, §26.121(a), by failing to comply with its permitted effluent limitations and by failing to submit the annual sludge report; and 30 TAC §290.51(a)(6) and the Code, §5.702, by failing to pay voluntary cleanup program fees, public health service, and late fees; PENALTY: $14,260; ENFORCEMENT COORDINATOR: Michael Meyer, (512) 239-4492; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(46) COMPANY: Cathy Tran dba Texas Laundry & Cleaners; DOCKET NUMBER: 2006-1315-DCL-E; IDENTIFIER: RN104027966; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-2292; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 588-5800.

(47) COMPANY: Asifa Shoaib dba Tip Top Cleaners; DOCKET NUMBER: 2006-0939-DCL-E; IDENTIFIER: RN104983853; LOCATION: Dallas, Dallas County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.11(e) and THSC, §374.102, by failing to renew the facility's registration by completing and submitting the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(48) COMPANY: Tom Woodruff Signature Homes, L.L.C.; DOCKET NUMBER: 2006-0757-WQ-E; IDENTIFIER: RN104902127; LOCATION: Midland, Midland County, Texas; TYPE OF FACILITY: construction sites for custom homes; RULE VIOLATED: 30 TAC §281.25(a)(4), 40 CFR §122.26(a)(9)(i)(B), and TPDES General Permit Number TXR150000 Part II Section D.3.a. and Part III Section D.1., by failing to implement adequate storm water best management practices; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Sunday Udoetok, (512) 239-2292; REGIONAL OFFICE: 3300 North A Street, Building 4, Suite 107, Midland, Texas 79705-5404, (915) 570-1359.

(49) COMPANY: Van & Jacqui, Inc. dba 1.35 Cleaners; DOCKET NUMBER: 2006-1173-DCL-E; IDENTIFIER: RN104967146; LOCATION: Cypress, Harris County, Texas; TYPE OF FACILITY: dry cleaner drop station; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(50) COMPANY: Windemere Lakes, L.L.C. dba $1.25 Dry Clean World; DOCKET NUMBER: 2006-1357-DCL-E; IDENTIFIER: RN104609151; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: dry cleaner; RULE VIOLATED: 30 TAC §337.10(a) and THSC, §374.102, by failing to complete and submit the required registration form; PENALTY: $889; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

TRD-200606621

Mary R. Risner

Director, Litigation Division

Texas Commission on Environmental Quality

Filed: December 12, 2006

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Notice of District Petition

Notices issued December 7 and December 12, 2006

TCEQ Internal Control No. 07122006-D01; Cape Royale Utility District of San Jacinto County has applied to the Texas Commission on Environmental Quality (TCEQ) for authority to adopt and impose an annual non-uniform operations and maintenance standby fee in the maximum amount allowable under the provisions of the Texas Water Code and applicable Commission rules using a projected maintenance tax rate of $0.115 per equivalent single family connection per month for calendar years 2006-2008, on unimproved property within the District.

The application was filed pursuant to Chapter 49 of the Texas Water Code, 30 Texas Administrative Code Chapter 293, and the procedural rules of the TCEQ. The TCEQ may approve the annual standby fee as requested, or it may approve a lower annual standby fee, but it shall not approve an annual standby fee greater than the amount requested. The standby fee is a personal obligation of the person owning the undeveloped property on January 1 of the year for which the fee is assessed. A person is not relieved of his pro-rated share of the standby fee obligation on transfer of title to the property. On January 1 of each year, a lien is attached to the undeveloped property to secure payment of any standby fee imposed and the interest or penalty, if any, on the fee. The lien has the same priority as a lien for taxes of the District. The purpose of standby fees is to distribute a fair portion of the cost burden for operations and maintenance costs and debt service of the District facilities to owners of property who have not constructed vertical improvements but have water, wastewater or drainage facilities or services available. Any revenues collected from the operations and maintenance standby fees shall be used to supplement the District's operations and maintenance account.

TCEQ Internal Control No. 10262006-D15: J.D. Weaver/Bastrop, Ltd. (Petitioner) filed a petition for creation of West Bastrop Village Municipal Utility District (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land, consisting of one tract, to be included in the proposed District; (2) there is one lien holder, Plains Capital Bank, on the property to be included in the proposed District, and the lien holder has consented to the creation of the proposed District; (3) the proposed District will contain approximately 348.053 acres located in Bastrop County, Texas; and (4) the proposed District is wholly within the extraterritorial jurisdiction of the City of Bastrop, Texas, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. By Resolution No. R-2006-24, effective September 13, 2006, the City of Bastrop, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioners have conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $28,181,800.

INFORMATION SECTION

The TCEQ may grant a contested case hearing on this petition if a written hearing request is filed within 30 days after the newspaper publication of this notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk,MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at 1-512-239-4691. Si desea información en Español, puede llamar al 1-512-239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200606637
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 13, 2006

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Notice of Water Quality Applications

The following notices were issued during the period of December 7, 2006

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

THE CITY OF AUSTIN has applied for a renewal of TPDES Permit No. 10543-013, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility is located approximately 4,800 feet east of the intersection of Blue Bluff Road and Lindel Lane and approximately 7,200 feet north of the intersection of Bloor Road and Farm-to-Market Road 973 in Austin in Travis County, Texas.

BEACON HOLDINGS CORPORATION has applied for a renewal of TPDES Permit No. WQ0013637001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 7,500 gallons per day. The facility is located approximately 500 feet southwest of the intersection of Farm-to-Market Road 350 and Farm-to-Market Road 3126 on the shoreline of Lake Livingston in Polk County, Texas.

C & R WATER SUPPLY, INC. has applied for a renewal of TPDES Permit No. 14264-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 60,000 gallons per day. The facility is located approximately 3.1 miles west of Interstate Highway 45 and approximately 350 feet south of League Line Road in Montgomery County, Texas.

CITY OF DEVERS has applied for a renewal of TPDES Permit No. 11540-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 80,000 gallons per day. The facility is located south of the City of Devers, on the south side of U.S. Highway 90 and adjacent to Chism Street in Liberty County, Texas.

ELLIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1 has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. 14378-001, which authorizes the discharge of filter backwash effluent from a water treatment plant at a daily average flow not to exceed 95,000 gallons per day. The facility is located in the southern portion of the City of Waxahachie, west of Farm-to-Market Road 877, approximately one mile southeast of the intersection of Farm-to-Market Road 877 and U.S. Highway 77 in Ellis County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO. 36 has applied for a renewal of TPDES Permit No. 12239-001, which autho-

rizes the discharge of treated domestic wastewater at a daily average flow not to exceed 990,000 gallons per day. The facility is located adjacent to Lateral H of Turkey Creek; approximately 2.2 miles south and 1.2 miles east of the intersection of Farm-to-Market Road 1960 and Interstate Highway 45 in Harris County, Texas.

CITY OF JUSTIN has applied for a renewal of TPDES Permit No. 11312-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 400,000 gallons per day. The facility is located approximately 600 feet east of Farm-to-Market Road 156 and approximately 1,600 feet south of Farm-to-Market Road 407 (1st Street) in Denton County, Texas.

LAPOYNOR INDEPENDENT SCHOOL DISTRICT has applied for a renewal of TPDES Permit No. 13538-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 12,000 gallons per day. The facility is located on the LaPoynor I.S.D. campus, approximately 2 miles southeast of the intersection of U.S. Highway 175 and Farm-to-Market Road 2588 in Henderson County, Texas.

NORTHSIDE SUBDIVISION WATER PLANT AND DISTRIBUTION CORP. has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014735001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 33,000 gallons per day. The facility will be located approximately 0.75 mile east of North State Highway 108 and 0.75 mile south of County Road 433, north of Stephenville in Erath County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. 10481-001, which authorizes the discharge of filter backwash effluent from a water treatment plant at an intermittent and flow variable rate. The current permit authorizes the disposal of water treatment plant sludge at an on-site water treatment sludge landfill which consists of sixty-one acres of land located at the water treatment plant site and also the storage of water treatment plant sludge temporarily in on-site lagoons. The facility is located at 505 East Brown Street, at the corner of U.S. Highway 78 and Brown Street in the City of Wylie in Collin County, Texas.

SEIS LAGOS UTILITY DISTRICT AND NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. WQ0011451001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 250,000 gallons per day. The facility is located at 1007 Riva Ridge in the Seis Lagos Development approximately 0.8 mile southeast of the intersection of Farm-to-Market Road 3286 in Collin County, Texas.

CITY OF WORTHAM has applied for a renewal of TPDES Permit No. 10551-001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 195,000 gallons per day. The facility is located approximately 0.75 mile east of State Highway 14 and one mile north of Farm-to-Market Road 27 in the northeast section of the City of Wortham in Freestone County, Texas.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.TCEQ.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200606635
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 13, 2006

♦ ♦ ♦

Notice of Water Rights Application

Notices issued December 11, 2006

APPLICATION NO. 5747A; TXU Mining Company, L.P., 1601 Bryan Street, Dallas, Texas 75201-3411, Applicant, has applied for an amendment to Water Use Permit No. 5747 to authorize an additional 400 acre-feet of water per year, and an additional five (5) diversion points/segments along Waldrop Branch and unnamed tributaries of Buckner Creek for mining purposes and to construct and maintain three (3) dams and reservoirs for mining purposes and sedimentation ponds on unnamed tributaries of Buckner Creek, Sabine River Basin, Panola County. The application was received on August 3, 2006. Additional information was received on September 14, 2006. The application was declared administratively complete and accepted for filing on September 28, 2006. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice

APPLICATION NO. 12098; Sabine River Bottom Partners, L.P., Applicant, has applied for a Water Use Permit to construct and maintain a dam and reservoir on unnamed tributary of Caney Creek and unnamed tributaries of the Sabine River, Sabine River Basin for in-place recreational and livestock purposes in Van Zandt County. The application was received on August 16, 2006 and additional information was received on October 25, 2006. The application was accepted for filing and declared administratively complete on November 10, 2006. Written public comments and requests for a public meeting should be submitted to the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notices, view the notices on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "[I/we] request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200606636
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 13, 2006

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on December 6, 2006, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Mohammad Adil Aquil; SOAH Docket No. 582-06-3270; TCEQ Docket No. 2004-1663-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Mohammad Adil Aquil on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Paul Munguia, Office of the Chief Clerk, (512) 239-3300.

TRD-200606640
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 13, 2006

♦ ♦ ♦

Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on December 7, 2006, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. Sada Bahar, Inc. dba Kwik Mart 6; SOAH Docket No. 582-06-2056; TCEQ Docket No. 2005-1563-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against Sada Bahar, Inc. dba Kwik Mart 6 on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Paul Munguia, Office of the Chief Clerk, (512) 239-3300.

TRD-200606638
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 13, 2006

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Proposal for Decision

The State Office of Administrative Hearings issued a Proposal for Decision and Order to the Texas Commission on Environmental Quality on December 5, 2006, in the matter of the Executive Director of the Texas Commission on Environmental Quality, Petitioner v. A&S Corporation dba Shiloh Beverage; SOAH Docket No. 582-06-2414; TCEQ Docket No. 2005-1919-PST-E. The commission will consider the Administrative Law Judge's Proposal for Decision and Order regarding the enforcement action against A&S Corporation dba Shiloh Beverage on a date and time to be determined by the Office of the Chief Clerk in Room 201S of Building E, 12100 N. Interstate 35, Austin, Texas. This posting is Notice of Opportunity to Comment on the Proposal for Decision and Order. The comment period will end 30 days from date of this publication. Written public comments should be submitted to the Office of the Chief Clerk, MC-105, TCEQ, P.O. Box 13087, Austin, Texas 78711-3087. If you have any questions or need assistance, please contact Paul Munguia, Office of the Chief Clerk, (512) 239-3300.

TRD-200606639
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: December 13, 2006

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Texas Health and Human Services Commission

Notice of Hearing on Proposed Provider Payment Rate Methodology

Hearing. The Health and Human Services Commission (HHSC) will conduct a public hearing to receive public comment on the proposed rate methodology for Federally Qualified Health Centers (FQHCs) and Rural Health Clinics (RHCs). These programs are operated by the Health and Human Service Commission (HHSC). The public hearing will be held on January 4, 2007, at 10:00 a.m. in the Permian Basin Meeting Room of the Braker Center, Building H, at 11209 Metric Boulevard, Austin, Texas 78758-4021. The hearing will be held in compliance with Title 1 of the Texas Administrative Code (TAC) §355.105(g), which requires public hearings on proposed payment rates. Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Irene Cantu, HHSC Rate Analysis, P.O. Box 85200, MC H-400, Austin, Texas 78708-5200, telephone number (512) 491-1358, by January 3, 2007, so that appropriate arrangements can be made.

Proposal. HHSC is increasing facility-specific rates for all FQHCs and RHCs for Calendar Year 2007 by the Medicare Economic Index (MEI), which is set by the Centers for Medicare and Medicaid Services, and the Alternative Prospective Payment System (APPS). The MEI was published in the *Federal Register* on December 1, 2006, at 71 FR 69750. These payment rates are proposed to be effective beginning January 1, 2007, or at the beginning of the provider's 2007 fiscal year, whichever is applicable.

Methodology and justification. The proposed rates were determined in accordance with the rate reimbursement setting methodology at 1 TAC §355.8261 for FQHCs and 1 TAC §355.8101 for RHCs and

in compliance with the Social Security Act §1902(bb) (42 USC §1396a(bb)).

Written and oral comments. Written comments regarding the proposed payment rate methodology may be submitted in lieu of testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Irene Cantu, HHSC Rate Analysis, P.O. Box 85200, MC H-400, Austin, Texas 78708-5200. Express mail can be sent, or written comments can be hand delivered, to Ms. Cantu, HHSC Rate Analysis, MC H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021. Alternatively, written comments may be sent via facsimile to Ms. Cantu at (512) 491-1998.

Briefing package. A briefing package describing the proposed payment rate methodology will be available, upon request, no later than December 18, 2006. Interested persons may request a copy of the briefing package by contacting Irene Cantu by telephone at (512) 491-1358. Briefing packages also will be available at the public hearing.

TRD-200606647
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 13, 2006

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Public Notice - Renewal of the Texas Home Living Program Waiver

The Texas Health and Human Services Commission (HHSC) is soliciting public comment on the submission of the State's application for a renewal of the Texas Home Living (TxHmL) Program waiver, which is a Medicaid Home and Community-Based Services waiver under the authority of §1915(c) of the Social Security Act. The current waiver is scheduled to expire February 28, 2007.

The TxHmL Program provides essential community-based services and supports to individuals with mental retardation living in their own homes or with their families. Services and supports are intended to enhance quality of life, functional independence, and health and well-being in continued community-based living in their own or family home and to enhance, rather than replace, existing informal or formal supports and resources.

The TxHmL Program will provide all services through two delivery options: the traditional agency delivery option and the consumer directed services option. Under the traditional agency delivery option, a provider agency employs or contracts with all service providers. Under the consumer directed service (CDS) option, the individual participating in the TxHmL Program or his or her legally authorized representative (LAR) directly hires, trains, manages, and when necessary, terminates service providers such as community support or respite service providers. The CDS option further allows these persons to hire or contract with other service providers, such as nurses and therapists. The CDS option gives individuals or their LARs increased choice and control over the delivery of services.

HHSC is requesting that the waiver renewal be approved for a five-year period beginning March 1, 2007. This waiver renewal maintains cost neutrality for each year in the five-year renewal period covering 2007 through 2011.

The comment period will end 30 days following the date this notice is published in the *Texas Register*. To obtain copies of the waiver, interested parties may contact Kyna Belcher by mail at Health and Human Services Commission, P.O. Box 85200, H-620, Austin, Texas 78708-5200; by telephone at (512) 491-1884; by facsimile at (512) 491-1953; or by e-mail at kyna.belcher@hhsc.state.tx.us. Comments on the waiver may be submitted to Ms. Belcher by mail at the address above.

TRD-200606618
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: December 12, 2006

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Department of State Health Services

Notice of Amendment Number 42 to the Radioactive Material License of Waste Control Specialists, LLC

Notice is hereby given by the Department of State Health Services (department), Radiation Safety Licensing Branch, that it has amended Radioactive Material License Number L04971 issued to Waste Control Specialists, LLC (WCS) located in Andrews County, Texas, one mile North of State Highway 176; 250 feet East of the Texas/New Mexico State Line; 30 miles West of Andrews, Texas.

Amendment number 42 grants an extension of two years to the time period that certain specific wastes owned by the U. S. Department of Energy, which originated from the clean up of the uranium processing site in Fernald, Ohio, may be stored at the WCS site. The amendment extends the allowed storage date to October 31, 2009.

The department has determined that the amendment of the license and the terms of conditions provide reasonable assurance that the licensee's radioactive waste processing facility is operated in accordance with the requirements of the Texas Administrative Code (TAC), Chapter 289; the amendment of the license will not be inimical to the health and safety of the public or the environment; and the activity represented by the amendment of the license will not have a significant effect on the human environment.

This notice affords the opportunity for a public hearing upon written request within 30 days of the date of publication of this notice by a person affected as set out in 25 TAC §289.205(f). A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is: (a) a resident of a county, or a county adjacent to a county, in which the radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Richard A. Ratliff, P.E., Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the agency action will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401; the Administrative Procedure Act (Texas Government Code, Chapter 2001); the formal hearing procedures of the department (25 TAC §1.21 et seq.); and the procedures of the State Office of Administrative Hearings (1 TAC Chapter 155).

A copy of the license amendment and supporting materials are available, by appointment, for public inspection and copying at the office of the Radiation Safety Licensing Branch, Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, tele-

phone (512) 834-6688, 8:00 a.m. to 5:00 p.m., Monday through Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Radiation Safety Licensing Branch.

TRD-200606631
Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 13, 2006

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Notice of Proposed Administrative Renewal of the Radioactive Material License of Waste Control Specialists, LLC

Notice is hereby given by the Department of State Health Services (department) that it proposes to grant an administrative renewal pursuant to 25 Texas Administrative Code (TAC), §289.205(e) and §289.252(y) for a two-year period of Radioactive Material License Number L04971 issued to Waste Control Specialists, LLC for its facility located in Andrews County, Texas.

The department has determined that the licensee has paid its license renewal fee, has a satisfactory compliance history, and otherwise complies with the requirements of 25 TAC §289.205(e) and §289.252(y).

This notice affords the opportunity for a public hearing upon written request by a person affected within 30 days of the date of publication of this notice as required by Texas Health and Safety Code, §401.264 and as set out in 25 TAC §289.205(e). A "person affected" is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is: (a) a resident of a county, or a county adjacent to a county, in which the radioactive material is or will be located; or (b) doing business or has a legal interest in land in the county or adjacent county.

A person affected may request a hearing by writing Richard A. Ratliff, P.E., Radiation Program Officer, Division for Regulatory Services, 1100 West 49th Street, Austin, Texas 78756-3189. Any request for a hearing must contain the name and address of the person who considers himself affected by this action, identify the subject license, specify the reasons why the person considers himself affected, and state the relief sought. If the person is represented by an agent, the name and address of the agent must be stated. Should no request for a public hearing be timely filed, the proposed issuance of the license will be final.

A public hearing, if requested, shall be conducted in accordance with the provisions of Texas Health and Safety Code, Chapter 401; the Administrative Procedure Act (Chapter 2001, Texas Government Code); the formal hearing procedures of the department (25 TAC §1.21 et seq.); and the procedures of the State Office of Administrative Hearings (1 TAC, Chapter 155).

A copy of the proposed license and information regarding the license renewal is available for public inspection and copying, by appointment, at the office of the Radiation Safety Licensing Branch, Department of State Health Services, Exchange Building, 8407 Wall Street, Austin, Texas, telephone (512) 834-6688, 8:00 a.m. to 5:00 p.m. Monday through Friday (except holidays). Information relative to inspection and copying the documents may be obtained by contacting Chrissie Toungate, Custodian of Records, Radiation Safety Licensing Branch.

TRD-200606632
Cathy Campbell
General Counsel
Department of State Health Services
Filed: December 13, 2006

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Texas Department of Housing and Community Affairs

Notice of Public Hearing

Multifamily Housing Revenue Bonds (Villas of Mesquite Creek) Series 2007

Notice is hereby given of a public hearing to be held by the Texas Department of Housing and Community Affairs (the "Issuer") at The Lakeside Activity Center, 101 Holley Park Drive, Mesquite, Dallas County, Texas 75149, at 6:00 p.m. on January 11, 2007, with respect to an issue of tax-exempt multifamily residential rental development revenue bonds in an aggregate principal amount not to exceed $15,000,000 and taxable bonds, if necessary, in an amount to be determined, to be issued in one or more series (the "Bonds"), by the Issuer. The proceeds of the Bonds will be loaned to One Mesquite Creek, L.P., a limited partnership, or a related person or affiliate thereof (the "Borrower") to finance a portion of the costs of acquiring, constructing, and equipping a multifamily housing development (the "Development") described as follows: 252-unit multifamily residential rental development to be located at approximately the 700 block of Gross Road, Dallas County, Texas. Upon the issuance of the Bonds, the Development will be owned by the Borrower.

All interested parties are invited to attend such public hearing to express their views with respect to the Development and the issuance of the Bonds. Questions or requests for additional information may be directed to Teresa Morales at the Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, TX 78711-3941; (512) 475-3344; and/or teresa.morales@tdhca.state.tx.us.

Persons who intend to appear at the hearing and express their views are invited to contact Teresa Morales in writing in advance of the hearing. Any interested persons unable to attend the hearing may submit their views in writing to Teresa Morales prior to the date scheduled for the hearing. Individuals who require a language interpreter for the hearing should contact Teresa Morales at least three days prior to the hearing date. Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

Individuals who require auxiliary aids in order to attend this meeting should contact Gina Esteves, ADA Responsible Employee, at (512) 475-3943 or Relay Texas at (800) 735-2989 at least two days before the meeting so that appropriate arrangements can be made.

TRD-200606641
Michael G. Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 13, 2006

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Notice of Public Hearing

Notice of Public Hearing for the PY 2007 Texas Weatherization Assistance Program State Plan/Application

The Texas Department of Housing and Community Affairs (TDHCA) will hold a public hearing to receive comments on the draft program year 2007 Texas Weatherization Assistance Program State Plan. Texas

anticipates receiving an estimated allocation of $6,607,385 for program year 2007. For planning purposes, since a final budget has not been passed by Congress and apportioned by the Office of Management and Budget, Texas will proceed with their respective plans using the same estimated level funding as last year. The estimated funding figure is subject to a slight increase or reduction based on the final allocations from the United States Department of Energy (DOE) at the conclusion of the Continuing Resolution process. Funding to subrecipients may be adjusted based on the final State allocation.

The public hearing will be held at 10:00 a.m. on Wednesday, January 3, 2007 in Room #116, State Insurance Building Annex, 221 East 11th Street, Austin, Texas. (The State Insurance Building Annex is situated directly across the street from the Capitol Visitor's Center, on the southeast corner of East 11th and San Jacinto streets.) At the hearing, a representative from TDHCA will describe changes to the Weatherization Assistance Program (WAP) and the proposed use of the U.S. Department of Energy funds for program year 2007, which will be for the period of April 1, 2007 to March 31, 2008.

Local officials and citizens are encouraged to participate in the hearing process. Written and oral comments received will be used to finalize the program year 2007 Texas Weatherization Assistance Program State Plan and Application. Written comments from those who cannot attend the hearing in person may be provided by the close of business at 5:00 p.m. on January 19, 2007, to Ms. Lolly Herrera, Senior Planner, Energy Assistance Section, Texas Department of Housing and Community Affairs, P.O. Box 13941, Austin, Texas 78711 or by electronic mail to Lolly.Herrera@tdhca.state.tx.us or by fax to (512) 475-3935. A copy of the proposed Draft Plan may be obtained, after December 22, 2006, through TDHCA's web site, http://www.tdhca.state.tx.us/ea.htm or by calling Ms. Herrera at (512) 475-0471 or by writing to Ms. Herrera at the TDHCA address given above.

Individuals who require auxiliary aids or services for this meeting should contact Ms. Gina Esteves, ADA responsible employee, at (512) 475-3943 or Relay Texas at 1-800-735-2989 at least two days before the meeting so that appropriate arrangements can be made.

Non-English speaking individuals who require interpreters for this meeting should contact Lolly Herrera, (512) 475-0471, at least three days before the meeting so that appropriate arrangements can be made.

Personas que hablan español y requieren un intérprete, favor de llamar a Jorge Reyes al siguiente número (512) 475-4577 por lo menos tres días antes de la junta para hacer los preparativos apropiados.

TRD-200606646
Michael Gerber
Executive Director
Texas Department of Housing and Community Affairs
Filed: December 13, 2006

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Texas Department of Insurance

Company Licensing

Application for admission to the State of Texas by RIVERPORT INSURANCE COMPANY, a foreign fire and/or casualty company. The home office is in Minneapolis, Minnesota.

Any objections must be filed with the Texas Department of Insurance, within twenty (20) calendar days from the date of the *Texas Register* publication, addressed to the attention of Godwin Ohaechesi, 333 Guadalupe Street, M/C 305-2C, Austin, Texas 78701.

TRD-200606644
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: December 13, 2006

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of LEGGETTE & COMPANY, INC. (using the assumed name of LEGGETTE ACTUARIES, INC.), a DOMESTIC third party administrator. The home office is DALLAS, TEXAS.

Application of JOHN SANDERS (using the assumed name of TPA PROCESSING), a foreign third party administrator. The home office is TULSA, OKLAHOMA.

Application of GLOBAL CLAIMS ADMINISTRATION, LLC (using the assumed name of GLOBAL ADMINISTRATION, LLC), a foreign third party administrator. The home office is CINCINNATI, OHIO.

Any objections must be filed within 20 days after this notice is published in the *Texas Register*, addressed to the attention of Matt Ray, MC 107-1A, 333 Guadalupe, Austin, Texas 78701.

TRD-200606645
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: December 13, 2006

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Texas Lottery Commission

Instant Game Number 790 "Crown Jewels"

1.0 Name and Style of Game.

A. The name of Instant Game No. 790 is "CROWN JEWELS". The play style is "key number match".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 790 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 790.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, $1.00, $2.00, $5.00, $10.00, $20.00, $50.00, $100, $200, $1,000, $5,000, or $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1:16 TAC GAME NO. 790 - 1.2D

Figure 1: GAME NO. 790 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
5	FIV
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
$1.00	ONE$
$2.00	TWO$
$5.00	FIVE$
$10.00	TEN$
$20.00	TWENTY
$50.00	FIFTY
$100	ONE HUND

$200	TWO HUND
$1,000	ONE THOU
$5,000	FIV THOU
$50,000	50 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2:16 TAC GAME NO. 790 - 1.2E

Figure 2: GAME NO. 790 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100, $200, or $500.

I. High-Tier Prize - A prize of $1,000, $5,000, or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number, and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (790), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 790-0000001-001.

L. Pack - A pack of "CROWN JEWELS" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075, while the other fold will show the back of ticket 001 and front of 075. Please note the books will be in an A - B configuration.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "CROWN JEWELS" Instant Game No. 790 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "CROWN JEWELS" Instant Game is determined once the latex on the ticket is scratched off to expose 45 (forty-five) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the prize shown for that number. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 45 (forty-five) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code, and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted, or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code, and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut and have exactly 45 (forty-five) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective, or printed or produced in error;

16. Each of the 45 (forty-five) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 45 (forty-five) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e., 10 and $10).

C. No more than three (3) identical non-winning prize symbols will appear on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

2.3 Procedure for Claiming Prizes.

A. To claim a "CROWN JEWELS" Instant Game prize of $5.00, $10.00, $20.00, $50.00, $100, $200, or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100, $200, or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "CROWN JEWELS" Instant Game prize of $1,000, $5,000, or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "CROWN JEWELS" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller of Public Accounts, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Office of the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "CROWN JEWELS" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "CROWN JEWELS" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code, §466.408. Any prize not claimed within that period and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales, and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 790. The approximate number and value of prizes in the game are as follows:

Figure 3:16 TAC GAME NO. 790 - 4.0

Figure 3: GAME NO. 790 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	820,000	7.32
$10	360,000	16.67
$20	160,000	37.50
$50	83,600	71.77
$100	30,000	200.00
$200	3,000	2,000.00
$500	1,800	3,333.33
$1,000	55	109,090.91
$5,000	33	181,818.18
$50,000	12	500,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 4.11. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 790 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 790, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200606627

Kimberly Kiplin
General Counsel
Texas Lottery Commission
Filed: December 12, 2006

♦ ♦ ♦

Instant Game Number 792 ”Platinum Payout”

1.0 Name and Style of Game.

A. The name of Instant Game No. 792 is ”PLATINUM PAYOUT”. The play style is ”key number match with auto win”.

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 792 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 792.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: 1, 2, 3, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 5X, 10X, $1.00, $2.00, $4.00, $5.00, $10.00, $15.00, $20.00, $25.00, $40.00, $50.00, $100, $500, $1,000 or $50,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 792 - 1.2D

Figure 1: GAME NO. 792 - 1.2D

PLAY SYMBOL	CAPTION
1	ONE
2	TWO
3	THR
4	FOR
6	SIX
7	SVN
8	EGT
9	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
5X	WINX5
10X	WINX10
39	TRNI
$1.00	ONE$
$2.00	TWO$
$4.00	FOUR$
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY

$25.00	TWY FIV
$40.00	FORTY
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU

E. Retailer Validation Code - Three (3) letters found under the removable scratch-off covering in the play area, which retailers use to verify and validate instant winners. These three (3) small letters are for validation purposes and cannot be used to play the game. The possible validation codes are:

Figure 2: GAME NO. 792 - 1.2E

CODE	PRIZE
FIV	$5.00
TEN	$10.00
FTN	$15.00
TWN	$20.00

Low-tier winning tickets use the required codes listed in Figure 2. Non-winning tickets and high-tier tickets use a non-required combination of the required codes listed in Figure 2 with the exception of ∅, which will only appear on low-tier winners and will always have a slash through it.

F. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There is a boxed four (4) digit Security Number placed randomly within the Serial Number. The remaining nine (9) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

G. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

H. Mid-Tier Prize - A prize of $50.00, $100 or $500.

I. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

J. Bar Code - A 22 (twenty-two) character interleaved two (2) of five (5) bar code which will include a three (3) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the nine (9) digit Validation Number. The bar code appears on the back of the ticket.

K. Pack-Ticket Number - A 13 (thirteen) digit number consisting of the three (3) digit game number (792), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 75 within each pack. The format will be: 792-0000001-001.

L. Pack - A pack of "PLATINUM PAYOUT" Instant Game tickets contains 75 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075. Please note the books will be in an A - B configuration.

M. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

N. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "PLATINUM PAYOUT" Instant Game No. 792 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule 401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "PLATINUM PAYOUT" Instant Game is determined once the latex on the ticket is scratched off to expose 44 (forty-four) Play Symbols. If a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins the prize shown for that number. If the player reveals a "5X" symbol, the player wins 5 times the PRIZE shown for that symbol. If the player reveals a "10X" symbol, the player wins 10 times the PRIZE shown for that symbol. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 44 (forty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 44 (forty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 44 (forty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 44 (forty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The "5X" and "10X" play symbols (multipliers) will only appear once on intended winning tickets and only as dictated by the prize structure.

C. No more than three (3) identical non-winning prize symbols will appear on a ticket.

D. No duplicate WINNING NUMBERS play symbols on a ticket.

E. No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

F. Non-winning prize symbols will never be the same as the winning prize symbol(s).

G. No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 10 and $10).

2.3 Procedure for Claiming Prizes.

A. To claim a "PLATINUM PAYOUT" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not, in some cases, required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "PLATINUM PAYOUT" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "PLATINUM PAYOUT" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "PLATINUM PAYOUT" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "PLATINUM PAYOUT" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code Section 466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 6,000,000 tickets in the Instant Game No. 792. The approximate number and value of prizes in the game are as follows:

Figure 3: GAME NO. 792 - 4.0

Figure 3: GAME NO. 792 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	720,000	8.33
$10	600,000	10.00
$15	160,000	37.50
$20	120,000	50.00
$50	80,000	75.00
$100	9,850	609.14
$500	750	8,000.00
$1,000	150	40,000.00
$5,000	17	352,941.18
$50,000	8	750,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.55. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 792 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 792, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-200606634
Kimberly Kiplin
General Counsel
Texas Lottery Commission
Filed: December 13, 2006

♦ ♦ ♦

Texas Parks and Wildlife Department

Notice of Proposed Real Estate Transactions and Opportunity for Comment

Dedication of Smith School Road

Acquisition of Conservation Easement

Travis County

In a meeting on January 25, 2007, the Texas Parks and Wildlife Commission (the Commission) will consider the public dedication and associated transfer of Smith School Road. The Commission will also consider the acquisition of a conservation easement on approximately 1.3 acres. Both transactions involve property adjacent to the Texas Parks and Wildlife Department headquarters complex in Travis County. The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. Before taking action, the Commission will take public comment regarding the proposed transaction. Prior to the date of the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by e-mail at ted.hollingsworth@tpwd.state.tx.us or in person at time of meeting.

Acceptance of Donation of 260 Acres

Presidio County

In a meeting on January 25, 2007, the Texas Parks and Wildlife Commission (the Commission) will consider acceptance of a donation of approximately 260 acres of desert bighorn sheep habitat in Presidio County, adjacent to the Black Gap Wildlife Management Area (WMA) from the Texas Bighorn Society (TBS). The meeting will start at 9:00 a.m. at 4200 Smith School Road, Austin, Texas. Before taking action, the Commission will take public comment regarding the proposed transaction. Prior to the date of the meeting, public comment may be submitted to Ted Hollingsworth, Land Conservation, Texas Parks and Wildlife Department, 4200 Smith School Road, Austin, Texas 78744 or by e-mail at ted.hollingsworth@tpwd.state.tx.us or in person at time of meeting.

TRD-200606630
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: December 12, 2006

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Public Utility Commission of Texas

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On December 4, 2006, State Telephone--Texas filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60259. Applicant intends to reflect a change in ownership/control and remove the resale-only restriction.

The Application: Application of State Telephone--Texas for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 33566.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than December 29, 2006. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 33566.

TRD-200606586
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 8, 2006

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Notice of Application for Designation as an Eligible Telecommunications Carrier Pursuant to P.U.C. Substantive Rule §26.418

Notice is given to the public of an application filed with the Public Utility Commission of Texas on December 5, 2006, for designation as an eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.418.

Project Title and Number: Application of Etex Communications, L.P. d/b/a Etex Wireless (Etex Wireless) for Designation as an Eligible Telecommunications Carrier (ETC) Pursuant to P.U.C. Substantive Rule §26.418. Docket Number 33580.

The Application: The company is requesting ETC designation in order to be eligible to receive federal universal service fund support throughout the entire rural telephone company study area of Etex Telephone Cooperative, Inc. Pursuant to 47 U.S.C. §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as an ETC for service areas set forth by the commission. Etex Wireless seeks ETC designation in the entire rural telephone company study area of Etex Telephone Cooperative.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by January 11, 2007. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 33580.

TRD-200606587
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 8, 2006

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Notice of Application to Amend Certificated Service Area Boundaries in DeWitt County, Texas

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application filed on December 4, 2006, for an amendment to certificated service area boundaries within DeWitt County, Texas.

Docket Style and Number: Joint Application of Guadalupe Valley Electric Coop., Inc. and AEP Texas Central Company to Amend a Certificate of Convenience and Necessity for Service Area Boundaries within DeWitt County. Docket Number 33571.

The Application: Guadalupe Valley Electric Cooperative, Inc. (GVEC) and AEP Texas Central Company (TCC) (Applicants), jointly filed an application to transfer an approximate 28-acre parcel of land from the service territory of GVEC to single certification of TCC. TCC has facilities available at the location. GVEC's nearest facilities are approximately 3 miles away.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas no later than December 29, 2006 by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 33571.

TRD-200606585
Adriana Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 8, 2006

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on December 6, 2006, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on or about December 18, 2006.

Docket Title and Number: Application of United Telephone Company of Texas, Inc., doing business as Embarq, for Approval of LRIC Study to Introduce Primary Rate Interface (PRI) Bundle - Business pursuant to P.U.C. Substantive Rule §26.214. Docket Number 33582.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 33582. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1- 888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 33582.

TRD-200606619
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2006

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Notice of Intent to File LRIC Study Pursuant to P.U.C. Substantive Rule §26.214

Notice is given to the public of the filing on December 6, 2006, with the Public Utility Commission of Texas (commission), a notice of intent to file a long run incremental cost (LRIC) study pursuant to P.U.C. Substantive Rule §26.214. The Applicant will file the LRIC study on or about December 18, 2006.

Docket Title and Number: Application of Central Telephone Company of Texas, doing business as Embarq, for Approval of LRIC Study to Introduce Primary Rate Interface (PRI) Bundle - Business pursuant to P.U.C. Substantive Rule §26.214. Docket Number 33583.

Any party that demonstrates a justiciable interest may file with the administrative law judge, written comments or recommendations concerning the LRIC study referencing Docket Number 33583. Written comments or recommendations should be filed no later than 45 days after the date of a sufficient study and should be filed at the Public Utility Commission of Texas, by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All comments should reference Docket Number 33583.

TRD-200606620
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 12, 2006

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Petition of the Greater Harris County 9-1-1 Emergency Network for a Declaratory Ruling That it is Not Required to be a Certificated Telecommunications Utility to Provide 9-1-1 Database Services to Itself

On November 28, 2006, the Greater Harris County 9-1-1 Emergency Network (GHC) filed the petition for declaratory ruling that a 9-1-1 administrative entity, such as GHC, is not required by P.U.C. Substantive Rule §26.433(c) or Public Utility Regulatory Act, Texas Utility Code Annotated §§11.001 - 66.017 (Vernon 1998 and Supplement 2006) (PURA) to become a certificated telecommunications utility (CTU) in order to provide 9-1-1 database services to itself. GHC included a brief in support of its petition.

Docket and Style: Petition of the Greater Harris County 9-1-1 Emergency Network for a Declaratory Ruling that it is not Required to be a Certificated Telecommunications Utility to Provide 9-1-1 Database Services to Itself. Docket Number 33544.

Summary: GHC respectfully requests that the Commission make the following declaratory order in this proceeding:

GHC, a 9-1-1 administrative entity, is not required under the terms of P.U.C. Substantive Rule §26.433 or PURA to be a CTU in order to provide 9-1-1 database services to itself for the creation and use of the Automatic Location Information (ALI) Database and the Selective Routing Database (SRDB).

GHC recently determined that it no longer intends to purchase 9-1-1 database services from an outside vendor. GHC believes that performing the 9-1-1 database functions for itself (instead of purchasing the 9-1-1 database services from a third-party vendor as it has done most recently) will further enhance GHC's ability to improve the 9-1-1 database quality for its jurisdictional area and place GHC in a better position to migrate to additional future E9-1-1 enhancements.

The intervention deadline in this proceeding is Friday, January 12, 2007. Persons who wish to intervene or comment should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All interventions and comments should reference Docket Number 33544.

TRD-200606588
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: December 8, 2006

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Office of Rural Community Affairs

Request for Proposals

Rural Performance and Quality Improvement Program

The Office of Rural Community Affairs (ORCA) seeks to procure the services of a qualified independent organization to develop, coordinate, and manage a rural performance and quality improvement program (PI/QI) for Texas rural and community hospitals.

DEADLINE. Proposals must be received by ORCA by close of business day on **January 26, 2007**. Proposals submitted electronically or by facsimile transmission will not be accepted and will not be eligible for funding. Projected Start Date of Project is February 1, 2007.

Program Goals. The purpose of this program is to provide a statewide, rural performance and quality improvement technology system and process based on the balanced scorecard (BSC) framework to assist rural hospitals to deliver high-quality care, increase patient safety, reduce medical errors, and improve hospital performance.

Eligibility, Qualification, and Program Specifications. Only public and non-profit organizations with demonstrable experience and history in working with Texas rural and community hospitals and in managing statewide rural hospital programs and services are eligible to respond to this Request for Proposals (RFP). ORCA invites qualified Applicants to submit proposals for the development, implementation, and management of a cost-effective, rural performance and quality improvement program based on a balanced scorecard framework that offers a strategy mapping process to identify, align, and link a hospital's strategic objectives to benchmarking activities, as well as a comprehensive technology solution that uses financial, clinical, satisfaction, and operational data to identify and monitor hospital-specific performance gaps. Responses showing advance planning, consensus-building efforts, cost-saving strategies, and effective management capabilities are preferable. Selected Applicant will work with ORCA staff as necessary to ensure achievement of program goals.

Availability of Funds. This program is supported by funds from the Medicare Rural Hospital Flexibility (Flex) Program, Grant No. H54RH00055, and the Small Rural Hospital Improvement Program (SHIP), Grant No. H3HRH00002, awarded by the U.S. Department of Health and Human Services, Health Resources and Services Administration's (HRSA) Office of Rural Health Policy (ORHP). ORCA may commit up to $162,512 for this program for FY 2007.

Project Period. The project period will be 12 months and will begin from the date of the award contract.

Screening, Evaluation and Selection of Proposals. Proposals will be screened for eligibility and completeness. Incomplete responses and those that do not meet the guidelines and requirements in this RFP will not be evaluated; remaining responses will be evaluated for funding considerations based on the evaluation criteria in the RFP. Selected Applicant will receive the Award Announcement Letter and the Award Contract from ORCA. The announcement of selection is not legally binding until an award contract is fully executed. Proposals submitted in response to this RFP will remain with ORCA and will not be returned. ORCA neither accepts any obligation by the retention of these proposals, nor commits to awarding any contract as a result of this RFP.

Contact Person. To obtain a copy of the application and guidance, please contact:

Office of Rural Community Affairs

1700 North Congress, Suite 220

Austin, Texas 78701

Attention: Dave Darnell

E-mail: ddarnell@orca.state.tx.us

Telephone: (512) 936-6701

TRD-200606590
Charles S. Stone
Executive Director
Office of Rural Community Affairs
Filed: December 11, 2006

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Texas A&M University, Board of Regents

Award of Consulting Contract

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, The Texas A&M University System furnishes this notice of consultant contract award. A notice for request of proposal was filed in the August 11, 2006 issue of the *Texas Register* (31 TexReg 6425).

The consultant will conduct a quality of work life assessment for the entire Texas A&M Physical Plant Department (College Station campus).

The consultant contract was awarded to: Customer Synergy Solutions, 2011 Valleria Court, Sugar Land, TX 77479. Total value of the contract: $52,384.00. Beginning and ending dates of the contract are October 26, 2006 through February 6, 2007.

Due dates: Brief written status reports - weekly. Comprehensive report documenting all findings, observations, recommendations, and support data January 18, 2007. Post report status briefing - on or about January 30, 2007. Post report detailed briefings on or about February 5, 2007.

TRD-200606581
Vickie Burt Spillers
Executive Secretary to the Board
Texas A&M University, Board of Regents
Filed: December 8, 2006

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).